health insurance. Employer contributions towards health insurance premiums are exempt from income and payroll taxes.[138] Therefore, while it is important to balance the needs of employers, much of the rhetoric used is overblown.

A. Amendments to § 502(a)(1)(B)

In contrast with many of the past proposals that have failed to advance in Congress, I do not propose upending ERISA's existing preemption regime. This will help alleviate concerns that businesses and insurers will be subjected to diverse state laws and regulations. Instead, my proposal focuses on improving ERISA's existing private right of action in three key ways: allowing for compensatory damages, codifying a right to discovery, and incorporating a bad faith cause of action.

The most important reform to ERISA § 502 would be allowing for compensatory damages, especially for pain and suffering. The existing ERISA regime does not fully compensate successful plaintiffs for the harms they experience. Additionally, it provides incentives for insurers to over-deny through the review process, because they are not liable for any additional costs incurred by plaintiffs. § 502(a)(1)(B) should be amended to add that plans are liable for economic and non-economic damages.[139] This proposal is the least controversial of the three included in this paper. While businesses and insurers understandably do not want the additional monetary exposure, most people recognize that § 502 currently undercompensates in a way that is not consistent with

https://www.mckinsey.com/industries/healthcare/our-insights/employers-look-to-expand-health-benefits-while-managing-medical-costs

[138] *Tax Policy Center Briefing Book: Key Elements of the U.S. Tax System*, TAX POLICY CENTER (May 2020), https://www.taxpolicycenter.org/briefing-book/how-does-tax-exclusion-employer-sponsored-health-insurance-work

[139] See H.R. 4628, Patients' Bill of Rights Act of 2004, https://www.congress.gov/bill/108th-congress/house-bill/4628/text (providing an example of such text).

ERISA's stated goal of protecting employees' interests.[140] Nor is this compensation consistent with basic principles of justice.

Secondly, ERISA should be amended to specifically codify a right to discovery beyond the administrative record. Courts have largely interpreted ERISA as not providing a right to discovery except when "very good reason" is present.[141] Unfortunately, this can make it difficult to uncover wrongdoing. Cases brought under state law, such as the McNaughton case discussed in Part I, have demonstrated the need for discovery. Without it, McNaughton would not have obtained United's internal communications that made it clear the decision to deny care was due to his "high dollar account."[142] This information is valuable for ERISA litigation; for example, if a plaintiff can demonstrate a practice of denying claims not based on medical necessity but based on cost, a judge is much more likely to say that the denial was not reasonable. Discovery would also provide valuable information for the public; even where cases have settled, the findings have been made public. While publicly shaming insurance companies may not compensate an individual plaintiff's harm, it may help build public momentum towards changing the insurers' behaviors. Insurers are likely to argue that discovery is not necessary because the administrative record provides sufficient information for judges. However, that allows the defendant insurers to control the flow of information and protects them at the expense of the plaintiff who suffered a wrongful denial. Insurers may also argue that this could lead to overexpansive fishing expeditions, but a judge will be monitoring the discovery process and can reign in plaintiffs.

[140] 29 U.S.C. § 1001(b).

[141] *Liston v. Unum Corp. Officer Sev. Plan*, 330 F.3d 19, 23 (1st Cir. 2003).

[142] Armstrong, Rucker, & Miller, *supra* note 28.

Finally, ERISA should incorporate a bad faith cause of action that would allow successful plaintiffs to recover punitive damages. While changing ERISA to allow recovery of compensatory damages exposes insurers to more liability, it still may not provide enough financial incentive for insurers to change their practices. Since it is not feasible to bring class actions under ERISA for wrongful denials, it is unlikely that enough compensatory damages could amass to adequately penalize insurers. What could, however, is the availability of punitive damages for successful bad faith claims.[143] This would be the most difficult proposal to pass politically; the ERISA coalition on Capitol Hill is strong. Nevertheless, with the right populist packaging, it could appeal to constituents on both sides of the aisle. Insurers are not beloved by most; new instances of insurer misbehavior are highlighted in the media every few months. Politicians could use these stories to argue that insurers must take accountability for their actions, including potentially facing punitive damages for bad faith wrongful denials of medically necessary care.

Because ERISA affects more than health insurance, it is important that these proposed changes work for other areas of employee benefit denials. These would provide benefits in all types of insurance. For example, another common employee benefit is disability insurance. Disability insurance has also been plagued by bad faith wrongful denials, primarily driven by Unum/Provident Corporation (Unum), the largest American insurer specializing in disability insurance.[144] Unum knowingly engaged in bad faith denials, pressuring employees to deny claims with "so-called subjective illnesses" that do not have a physical manifestation on an x-ray or

[143] Loud, *supra* note 3, at 1065.

[144] John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 1001 NW. U. L. REV. 1315 (2007).

MRI.[145] Unum understood the benefit of ERISA protection. In an internal memo, an Unum executive "identified 12 claims situations where we settled for $7.8 million in the aggregate. If those 12 cases had been covered by ERISA, our liability would have been between zero and $0.5 million."[146] The ability to increase damages, both through adequate compensatory and punitive damages, could help bring maliciously misbehaving insurers like Unum under control. Similarly, the ability for discovery to shine a light on bad business practices, particularly for more careful players whose behavior would be affected by bad publicity, would also be valuable.[147]

B. Regulatory Action Available to Improve ERISA § 502

The Department of Labor (DOL) has jurisdiction over ERISA.[148] If Congress will not act, the DOL should fill the void. The DOL has primarily used its ERISA authority to regulate pensions. However, it could write regulations that would help improve a plaintiff meaningfully recover under § 502. For example, "benefit" in § 502 has never been defined, so courts have interpreted it as only encompassing the amount of the benefit. DOL could promulgate regulations that define "benefit" more broadly as including reasonable economic and noneconomic damages and suggest a schedule of damages that accounts for lost wages and suffering.[149] While compensatory damages alone are not sufficient, it would improve conditions for plaintiffs until Congress undertakes a more significant reform of ERISA.

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[145] *Id.* at 1318-19.

[146] *Id.* at 1321 (quoting from Memorandum from Jeff McCall to IDC Management Group & Glenn Felton, Provident Internal Memorandum, Re: ERISA (Oct. 2, 1995)).

[147] *See id.* (describing Unum as uniquely clumsy, but highlighting that subtler self-interested insurers might escape detection more easily).

[148] Jacobson, *supra* note 45, at 91.

[149] *Id.* at 96.

There is a question of whether the courts would uphold these suggested regulations. For example, the courts could interpret any attempt by DOL to define the terms as a violation of ERISA's exclusive remedial structure.[150] However, ERISA clearly delegates regulatory authority to DOL, and it is an appropriate exercise of regulatory discretion to define terms that neither the Court nor Congress has yet defined.[151] Likewise, these regulations do not overturn § 502's exclusive structure. Instead, they complement rather than undermine ERISA preemption.[152]

PART IV. CONCLUSION

Divided government presents an opportunity for Congress to pass bipartisan legislation to reform ERISA and enhance the health insurance coverage Americans already have. Because more ambitious reforms like Medicare-for-all or a Medicare public option are not feasible with Republican control of the House of Representatives, reforming the private right of action under ERISA § 502 would appeal to both sides of the aisle. For Republicans, ERISA reforms strengthen the existing multi-payer system while providing a populist talking point. For Democrats, reforming § 502 would give beneficiaries better ammunition to fight back against insurers. Both parties could take advantage of the plethora of articles highlighting the misdeeds of insurers to demonstrate their willingness to work on behalf of their constituents against big corporate interests. Therefore, while ERISA reforms have seemingly receded to the background, this is a uniquely opportune moment for both parties to seize on the issue and reform ERISA's private right of action.

[150] *Id.* at 97.

[151] *Id.*

[152] *Id.*

Applicant Details

First Name	**Margaret**
Last Name	**Hassel**
Citizenship Status	**U. S. Citizen**
Email Address	**margaret.hassel@law.columbia.edu**
Address	**Address** Street **120 W. 138th St., Apt. 1E** City **New York** State/Territory **New York** Zip **10030**
Contact Phone Number	**919-923-6451**

Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**May 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Native American Law Students Association Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Shanahan, Colleen
colleen.shanahan@columbia.edu
Andrias, Kate
kandrias@law.columbia.edu
Metzger, Gillian
gmetzg1@law.columbia.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Margaret Hassel
120 W. 138th St., Apt. 1E, New York, NY 10030
(919) 923-6451 | margaret.hassel@law.columbia.edu

June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals
Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am a rising third-year law student at Columbia Law School and the Editor-in-Chief of the *Columbia Law Review*, and I write to apply for a clerkship in your chambers beginning in 2024 or any subsequent term. I enjoyed speaking with you and hearing your talk at the Columbia OutLaws event this spring and would be very excited to clerk for you because of your background in advocacy for the public interest and your service in the state judiciary.

I have been committed to working in the public interest since before I came to law school and intend to bring that commitment into my legal career. I have focused particularly on antidiscrimination work through summer internships with the Fair Housing Justice Center and, this summer, with Relman Colfax PLLC, a civil rights law firm in Washington, D.C. I hope that a clerkship will allow me to contribute to the court's essential work while building my skills to become a civil rights litigator. My experience supporting domestic violence survivors in state court before law school sparked, in large part, my interest in the law, and I would be particularly interested in clerking for someone who understands the importance and interaction of state and federal laws and courts.

Enclosed please find my resume, law school transcript, undergraduate transcript, and writing sample. Also enclosed are letters of recommendation from Professors Gillian Metzger (212-854-2667, gmetzg1@law.columbia.edu), Kate Andrias (212-854-5877, kandrias@law.columbia.edu), and Colleen Shanahan (212-854-8030, colleen.shanahan@columbia.edu). Professor Ashira Ostrow (212-854-4668, arp61@columbia.edu) and Madhulika Murali of the Fair Housing Justice Center (212-400-8201, mmurali@fairhousingjustice.org) have agreed to serve as references.

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,

Margaret Hassel

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EDUCATION

Columbia Law School, New York, NY
J.D., expected May 2024
Honors: James Kent Scholar '21–'22, '22–'23 • Public Interest/Public Service Scholar
Activities: Editor-in-Chief, Columbia Law Review • Advocacy Chair, Domestic Violence Project
Constitutional Law Teaching Assistant for Professor Kate Andrias
Research Assistant for Professor Kate Andrias and Professor Elizabeth Emens
Journal of Gender and Law 1L Staff Member • Native American Law Moot Court
Note: Disparity and Deference: HUD Regulation in the Lower Courts

University of North Carolina – Chapel Hill, Chapel Hill, NC
B.A., received May 2019
Majors: Women's and Gender Studies; Economics
Honors: Honors in Economics (awarded for senior thesis)
Highest Distinction (university's highest academic honor)
Order of the Golden Fleece (awarded for significant impact on the university)
Morehead-Cain Scholar (four-year, full tuition and living expenses scholarship)
Activities: Undergraduate Student Attorney General '18–'19 • Attorney General Staff '15–'18
Thesis: Gendered Labor Market Decisions Among Queer and Straight Couples

EXPERIENCE

Relman Colfax PLLC Washington, D.C.
Summer Associate *May 2023–Aug. 2023*

Morningside Heights Legal Services – Community Advocacy Lab New York, NY
Student Attorney *Jan. 2023–Apr. 2023*
Represented client, the Red Hook Community Justice Center, in improving public housing tenants' access to repairs and to the right to withhold rent in response to unlivable conditions. Researched underlying legal issues, observed court practices, and wrote a memorandum summarizing findings in team of three.

Fair Housing Justice Center New York, NY
Legal Intern *May 2022–July 2022*
Researched organizational standing, protections for renters with limited English proficiency, and federal and New York fair housing laws. Wrote policy brief and memo advocating for increased protection for renters impacted by the criminal legal system to present to state legislators. Interviewed clients during intake calls and assessed strength of housing discrimination cases.

Goddard Riverside Law Project New York, NY
Legal Intern *Oct. 2021–Apr. 2022*
Researched legal topics relevant to tenant-clients' concerns, including eviction prevention, health and safety concerns, civil fines and sanctions against landlords, and COVID-19 housing policies. Wrote formal legal memo on reasonable accommodations and tenant-facing guide on rent regulation.

Compass Center for Women and Families Chapel Hill, NC
Housing Services Coordinator *Jan. 2019–May 2021*
Led implementation of new long-term housing program for survivors of domestic violence. Represented agency in county- and state-wide housing committees and meetings. Supported over 700 clients with legal information, crisis response, and safety planning in time at agency.
Other roles: Court Advocacy Intern, Hotline Advocate *Oct. 2016–Jan. 2019*

Columbia Law School

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CLS TRANSCRIPT (Unofficial)

06/10/2023 11:43:04

Program: Juris Doctor

Margaret L. Hassel

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9362-1	Community Advocacy Lab Clinic	Shanahan, Colleen F.	3.0	A
L9362-2	Community Advocacy Lab Clinic - Fieldwork	Shanahan, Colleen F.	4.0	A
L6327-1	Employment Law	Barenberg, Mark	4.0	A
L6683-1	Supervised Research Paper	Johnson, Olatunde C.A.	1.0	CR

Total Registered Points: 12.0

Total Earned Points: 12.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	A
L6272-1	Land Use	Ostrow, Ashira Pelman	3.0	A
L6675-1	Major Writing Credit	Johnson, Olatunde C.A.	0.0	CR
L8293-1	S. Access to Justice: Current Issues and Challenges	Richter, Rosalyn Heather; Sells, Marcia	2.0	A
L8659-1	S. The Roberts Court	Metzger, Gillian; Verrilli, Donald B.	2.0	A
L6683-1	Supervised Research Paper	Johnson, Olatunde C.A.	2.0	CR

Total Registered Points: 12.0

Total Earned Points: 12.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	A-
L6121-34	Legal Practice Workshop II	Kintz, JoAnn Lynn	1.0	P
L6169-1	Legislation and Regulation	Metzger, Gillian	4.0	A
L6873-1	Nalsa Moot Court	Kintz, JoAnn Lynn	0.0	CR
L6116-4	Property	Merrill, Thomas W.	4.0	A
L6118-2	Torts	Rapaczynski, Andrzej	4.0	B+

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-3	Legal Methods II: Methods of Statutory Drafting and Interpretation	Ginsburg, Jane C.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	A
L6133-7	Constitutional Law	Murray, Kerrel	4.0	A
L6105-4	Contracts	Emens, Elizabeth F.	4.0	A-
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-14	Legal Practice Workshop I	Jimenez, Jessica; Yoon, Nam Jin	2.0	HP

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 56.0

Total Earned JD Program Points: 56.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	2L
2021-22	James Kent Scholar	1L

June 11, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write with my strongest recommendation for Margaret Hassel for a clerkship in your chambers. Margaret was a student in Spring 2023 in Community Advocacy Lab, a law school clinic that focuses on policy and legislative advocacy and court reform. As a clinic student, Margaret was primarily responsible for a client engagement that involved developing litigation and policy strategies regarding the warranty of habitability for public housing residents in New York. I'll cut to the chase: Margaret is an exceptional and rare law student and clerkship applicant. She combines all the traditional markers of the highest level of academic excellence with superlative leadership, advocacy, and personal qualities. She is easily among the top few young lawyers I've taught or mentored in 20 years in the academy and practice.

I won't recap all the ways that Margaret is a star at Columbia Law, as I'm confident Margaret's materials and the recommendations of my colleagues will do so. I will, however, add how I saw this academic performance translate to the hybrid academic/work environment that is my clinic. It is not unusual for me to have a student in clinic who has had great academic success and then, when they encounter clients, messy facts, law in practice that does not match the law on the books, collaborating with peers, and working with supervisors in clinic, they struggle. Margaret excelled on every front. And, despite entering clinic at a very high level of facility across every dimension, she was thoughtful and intentional about identifying where she wanted to learn and improve, and she grew even more in her semester in clinic.

Margaret's clinic client was a nonprofit organization that runs a community court. Among other things, this organization provides legal information and services to public housing residents in New York City. Margaret's charge, in a team of three students, was to develop a range of legal strategies using the warranty of habitability to address dire housing conditions for public housing residents. Margaret mastered the initial phase of this project: developing a deep and nuanced understanding of the "law on the books" including state and federal precedent, statutes and regulations, and court rules regarding the warranty itself as well as contextual law and procedure regarding housing conditions and eviction in New York. Margaret's depth and precision in this research, as well as her efficiency in completing it, was unlike anything I've seen in a law student. Further, Margaret's writing (first, a legal memo addressing all of the above and then ultimately several documents integrating the legal and factual work of the project) was top notch. The first draft of Margaret's legal memo was basically perfect, something I've never experienced from a clinic student, let alone a second year student.

For even the most impressive law students, the hardest part of our clinic's work is confronting the difference between the law on the books and the law in practice. Especially in the areas of law where we work – housing, debt collection, family court – informal law and procedure varies meaningfully from written law. Rather than being overwhelmed, Margaret gravitated toward this challenge. This is a reflection of her experience in domestic violence cases before law school. It is also a reflection of her natural curiosity about the law and her empathy for vulnerable people. To understand the "law in practice," Margaret and her teammates observed housing court, interviewed judges, lawyers, and court staff, and spoke with litigants and tenant organizers. One thing that stood out about Margaret was how she prepared for these interviews: her interview outlines and questions masterfully balanced incisive inquiry into very specific issues of housing law and deep emotional intelligence and attunement to her audience. Whether the interviewee was a judge with decades of experience or a tenant who was suffering from the health effects of housing conditions, Margaret earned the person's respect and made them feel heard, while learning what she needed to for her work. Any of these capacities is unusual in a second year law student, and the combined expertise is exceptional.

Another thing that stood out was the way in which Margaret analyzed all of the facts she gathered in combination with her understanding of the law. As any of us well into practice understand, the best lawyers are those who can artfully reconcile the coexistence of facts and law. Margaret did this in her clinic work. She grappled with information from different sources that might seem in conflict. For example, she encountered a judge who said his practice was to allow certain counterclaims, and then sat in hearings where the opposite happened. She read written procedure requiring conditions claims to be addressed, and interviewed lawyers saying such claims were not allowed. Margaret was able to develop strong theories about the status quo, reconciling these inconsistencies. We have already heard from advocates and court leaders that this analysis has advanced their own understanding of these issues.

What was truly impressive about Margaret's work was her creative analysis of what the law could be. Appropriately identifying legislative change or big changes in precedent as unrealistic, she identified discrete changes to court practice that would facilitate unrepresented tenants' capacity to bring claims regarding housing conditions within existing procedure. She then went further to suggest small scale changes to court rules that would affirmatively encourage this type of change. Finally, she identified a path within existing law for tenants to raising housing conditions in small claims court. This last advocacy strategy was novel in New York. It is a nuanced and thoughtful use of existing law and procedure, and has already taken hold among legal aid organizations as a strategy for cases with representation. Further, the client organization was so impressed with this work that they are now using materials developed by Margaret and her team to educate unrepresented litigants about how to pursue these strategies.

Everything I've written thus far describes Margaret's impressive contributions regarding what she did in clinic, but how she did this work even further illustrates her strengths. Margaret has extraordinary leadership skills, the most important of which is her

Colleen Shanahan - colleen.shanahan@columbia.edu

capacity for collaboration. She balanced – in a way that many of us years into careers continue to strive for – facilitating the contributions of others while steering the goals and substance of the group's work. I saw this in her project team's work, where all of the work I just described was in the context of two others' students work. Margaret was able to draw out her teammate's strengths without diminishing her own. She was plainly the most driven, efficient, and organized of the group, traits that could have been sources of conflict. Yet Margaret was able to explicitly navigate different motivations, contributions, and approaches to work to lead the team to substantive success in a collaboration. And, the entire team was delighted to be working together all semester.

Margaret's strengths also played out in our seminar sessions with the entire class, where Margaret regularly contributed to the work of other projects and others' learning by giving feedback on simulations, adding new research ideas, or critiquing a solution. At the end of each semester, I ask each student to anonymously submit a sentence about what they appreciate about each clinic classmate. I was struck by how every single colleague of Margaret's submitted some version of what I've just said. Here's one example: "I appreciate how thoughtful Margaret is. When we have in-class discussions, she always provides such informed perspectives. I have worked with Margaret before, so I have known this about her; but, it was a treat to see how she distills her interests, scholarship, and experience in each engagement to offer something new. She also shares these perspectives compassionately and intentionally, without an ounce of condescension. This is something that feels rare in law school, and I so appreciate it about her."

Finally, part of the clinic experience is spending meaningful time talking about law school and career goals, including very specific personal and professional development goals. My conversations with Margaret have only deepened my admiration for her. She thoughtfully engages with questions about her role in the legal profession and how she can be an active, intentional, lifelong learner. Throughout the semester we talked about her various roles as a leader (in and outside of clinic) and how to navigate this in a sustainable way as a law student and ultimately in practice. This self-reflective orientation gives me great confidence that Margaret will only develop greater capacity to contribute to the workplaces, people, and communities with whom she works.

Unsurprisingly, Margaret has been thoughtful and intentional about whether to clerk and why she wants to clerk. It sounds a bit strange, but this is rare, especially for students as successful as Margaret. She understand that a clerkship is a very specific kind of experience and she is very clear about how she will contribute to and enjoy clerking: she enjoys mastering new areas of law, she wants to see a range of practice, she likes a combination of independent and small group work, and she loves tackling complex legal and factual questions. I have no doubt Margaret will be an exceptionally valuable clerk, because her work will be of the highest quality and because she will be a treasured member of chambers.

Please let me know if any more information would be helpful. I would be happy to speak more about Margaret. I am best reached at colleen.shanahan@law.columbia.edu or on my mobile phone at 917-553-6752.

Sincerely,

Colleen F. Shanahan
Clinical Professor of Law

June 11, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing with the greatest enthusiasm to recommend Margaret Hassel for a clerkship in your chambers. Margaret is an exceptionally intelligent individual; she is a phenomenal writer; and she is deeply committed to using the law to serve the public interest. As a former law clerk on the U.S. Court of Appeals for the Ninth Circuit and U.S. Supreme Court, I am confident that Margaret will be an excellent law clerk, and I hope you will seriously consider her application.

I first heard about Margaret in the summer of 2022 when I was asked to take over a section of Constitutional Law from my colleague, Kerrel Murray, who was taking a leave from Columbia Law School to serve as a returning clerk to Justice Ketanji Brown Jackson. I asked Prof. Murray whether he had already hired teaching assistants and whether he would recommend that I retain any of them. Prof. Murray recommended Margaret in glowing terms—she had been one of the top students in his constitutional law class the prior year, earning one of the very best grades on the exam, and had been one of the strongest participants both during cold calls and during class discussion.

As expected, Margaret has been a stellar teaching assistant. She drafted several problems for the 1L students to test their understanding of doctrinal questions involving federalism, equal protection, and due process; wrote model answers; taught weekly discussion and review sessions for small groups of students; and offered students detailed feedback on their written work. In every respect, she was terrific. She was able to communicate complicated legal questions clearly; to engage students in discussion; and to navigate challenging interpersonal dynamics. She became the default leader among my teaching assistants, organizing the others on assignments and making sure all of the work was complete and equitably shared, always respectfully and gently.

Since January 2023, Margaret has also worked as my research assistant. In that capacity, I was able to observe even more closely her excellent writing ability and her skill as a legal analyst. Thus far, she has completed three significant research assistant assignments. First, she conducted a literature review on two questions: How do unions protect against the rise of authoritarianism; and how does internal union democracy contribute to political democracy? Second, she edited a draft of a chapter I wrote on democracy as a motivating purpose behind labor law. Third, she researched the extent to which state-level referenda and initiatives are pro-democratic (or what conditions make them pro-democratic) and drafted a memo about the legal issues surrounding the California app-based drivers' referendum. On all of these projects, I was impressed not only by Margaret's substantive skills, but also her ability to manage competing deadlines and to work efficiently. Her work product was terrific: careful, thorough, well-written, and insightful.

Not surprisingly, Margaret has excelled in all of her law school classes. She loves the law and she lights up when she discusses all sorts of topics—from property and contract law to constitutional and administrative law, from thorny doctrinal issues to empirical studies.

Margaret has also taken on a leadership role within the law school as the Editor-in-Chief of the Columbia Law Review. It came as no surprise to me that her peers chose her to serve in this role. Her intellect, her calm demeanor, and her extraordinary efficiency has made her a phenomenal choice. She has also worked in the Community Advocacy Lab Clinic and written three significant research papers during her first two years in law school: one on lower courts' treatment of HUD regulations after Inclusive Communities Project; one on workers' compensation during the COVID-19 pandemic; and one on the status of disparate impact liability given changes in Supreme Court equal protection doctrine. I have enjoyed discussing all of these with her.

Margaret's commitment to public service work is deep. During her first summer, she worked at the Fair Housing Justice Center. She has also interned with the Goddard Riverside Community Law Project through the school year and will spend will spend her second summer at a civil rights firm. Long term, she hopes to work in civil rights litigation, at both the trial and appellate levels. Before law school, she managed a program at a domestic violence nonprofit. She brings that significant professional experience to bear on her work as a law student.

I hope you'll find the chance to speak with Margaret, as I think you would enjoy the conversation. Ultimately, I think you would find her to be a terrific law clerk. Her forceful intellect, excellent writing skills, and sharp sense for legal analysis make her a most worthy candidate. I am confident that she will be able to distill complicated issues and write detailed and crisp legal analyses. And her good nature and amazing efficiency would make her a pleasure to have in chambers.

Please let me know if I can answer any questions or tell you more. I can be reached at kandrias@law.columbia.edu or on my cell phone at 202-714-9288.

Sincerely,

Kate Andrias
Patricia D. and R. Paul Yetter Professor of Law

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Kate Andrias - kandrias@law.columbia.edu

June 11, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I'm writing to recommend Margaret Hassel, a rising Columbia Law School 3L, for a clerkship in your chambers. It is an easy task. Margaret is an exceptionally intelligent and thoughtful student who excels on all fronts: her analytic abilities are outstanding; she is an excellent and clear writer; and she has remarkable maturity and good judgment. Selected by her student peers to be Editor-in-Chief of the Columbia Law Review, she is one of the top academic stars of her class. I am confident that she will be a fabulous law clerk.

I have taught Margaret in two classes during her time at Columbia: Legislation and Regulation in her 1L spring and the Roberts Court Seminar in her 2L fall. She did extremely well in both, earning straight As. Perhaps even more impressive, Margaret had a pronounced impact on both classes, consistently enriching our class discussions with her thoughtful comments and analytic insights.

Margaret stood out in LegReg. Her deep engagement was evident from the start, and I was struck early on by how thoughtful and sophisticated her comments were. She was obviously very sharp analytically, deftly identifying key analytic moves in cases and their implications for new contexts. But Margaret also had a great appreciation for the institutional and practical dimensions of the course, and from the very start would hone in on the broader tensions and impacts of certain lines of case law. It was a smaller section than I usually teach, around 60 students, and Margaret was one of my main go-to students when I wanted to push the class discussion deeper.

I was particularly pleased when Margaret applied to join the Roberts Court Seminar the next fall. I co-teach the seminar with former Solicitor General Don Verrilli, and it is an intensive dive into the constitutional jurisprudence of the Roberts Court. The class serves as a capstone course for 3Ls who have a passion for public law, and the discussion is usually at a pretty high level. Margaret took it as a 2L, and she quickly emerged again as one of the most thoughtful contributors in the class. Throughout the semester, she consistently contributed some of the best comments each class. The seminar also gave me a chance to engage with her writing, and again Margaret's work was extremely strong. Her four response papers were all clearly and powerfully written, as well as striking in their analytic rigor. Her final paper on the future of disparate impact under the Roberts Court was particularly impressive. It is not easy to fit a nuanced and sophisticated analysis of a complex jurisprudential issue into 15 pages. But Margaret managed it, producing the most intellectually rigorous paper we received.

Margaret's outstanding performance in my classes is hardly an exception. She has compiled an extraordinary academic record so far at Columbia, earning the status of Kent Scholar—Columbia's highest annual academic honor—her 1L year. She is well on her way to achieving Kent Scholar again her 2L year, with six straight As and one grade not yet in. In my view, she is clearly one of the very strongest students in her class.

I have also enjoyed interacting with Margaret in her role as Editor-in-Chief of the Law Review and mine as Chair of the Board of Directors. Margaret was a natural pick for EIC. She's not only analytically brilliant and a great writer, but also an obvious leader with a warm, unpretentious, and engaging manner. Her maturity and good judgment were no doubt honed by the two years she spent leading a domestic violence housing program—though I tend to think her natural aptitude was what led her to be given such responsibility right out of college.

Margaret is also deeply committed to public service. She has continued to pursue her interest in housing issues at Columbia, working during the year on tenant's rights issues through a pro bono housing organization and clinic. She spent last summer at a housing nonprofit and will work on housing again this summer at a civil rights firm. Having seen what a force she is, I have no doubt that with a little time, she will be a leading housing and civil rights advocate.

In sum, Margaret is a simply exceptional clerkship candidate. Please do not hesitate to reach out to me if there is any further information on Margaret that I can provide.

Very truly yours,

Gillian E. Metzger

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Clerkship Writing Sample

I wrote this paper for a seminar on the Roberts Court in fall of 2022. The instructors for the course were Professor Gillian Metzger and Professor Don Verrilli. We were allowed to write a paper on any topic related to the Roberts Court.

I received feedback from the professors on my idea for the paper, which helped me decide to focus on the 2022–2023 Term. Nobody other than me has edited the paper for substance, style, or grammar. The professors sent me a paragraph of substantive feedback along with my grade; I have not made any changes to this draft based on that feedback, however. The paper reflects the time that it was written, prior to any 2022–2023 Term decisions.

DISPARATE IMPACT IN THE ROBERTS COURT: 2022–2023 TERM

INTRODUCTION

Justice Scalia suggested in his *Ricci v. DeStefano* concurrence that disparate impact liability might conflict with the Equal Protection Clause because the former forces private and public actors to consider racial results in their decisionmaking.[1] He thought it likely violated the (reverse incorporated) Equal Protection Clause for the federal government to impose on private parties an obligation to engage in racially-motivated decisionmaking.[2] This paper will explore that line of thinking in past cases, including the majority in *Ricci*, and then focus on the extent to which two 2022–2023 Term cases threaten to make it part of Supreme Court doctrine. There are three questions available for discussion. First, does the statutory threat of disparate impact liability promote racial decisionmaking to the extent that the statute prima facie violates the Equal Protection Clause?[3] Second, if so, does the federal government have a compelling interest to justify the imposition of disparate impact liability?[4] Third, assuming the federal government has such an interest, is disparate impact liability a narrowly tailored way to achieve it?[5]

The answers to these questions depend on how courts handle individual allegations of disparate impact. For instance, Scalia argued in *Ricci* that requiring employers to justify a policy with a disparate impact as a business *necessity* penalizes policies that were adopted without racial

[1] Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) ("[The Court's] resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?").

[2] A showing of intent is required to prove an Equal Protection Violation. Washington v. Davis, 426 U.S. 229, 239 (1976). If a state actor intended to target people based on race, they can be responsible for an Equal Protection violation even if their action or statute was facially neutral. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 231–32 (1985).

[3] This paper focuses exclusively on race discrimination. Other characteristics may implicate many of the same issues, but they (other than national origin) get different equal protection analyses. Therefore, their relationship to disparate impact liability may differ.

[4] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

[5] *Id.*

intent.[6] That penalty requires employers with no preexisting racial motivation to consider whether their policies will have a racially disparate impact and then keep those policies only if necessary, placing a "racial thumb on the scales."[7]

This critique implicates two parts of the equal protection analysis. First, whether the imposition of disparate impact liability constitutes prima facie racial discrimination under the Equal Protection Clause depends both on the expansiveness of statutory liability and on the way the Court defines race discrimination. Second, assuming the imposition of disparate impact liability constitutes racial discrimination, disparate impact liability's breadth determines whether it is narrowly tailored to Congress's goals.

Those considerations could lead to two kinds of remedy. On one hand, the Court could hold that disparate impact liability, as it is written into the statutes, extends too far, promotes racial decisionmaking, and fails to be narrowly tailored, and therefore must be excised.[8] On the other hand, the Court could read disparate impact statutes to extend only so far as to avoid constitutional issues.[9] Either way, if the Court reads many instances of disparate impact liability as encouraging or requiring unconstitutional behaviors, it may eliminate or restrict antidiscrimination law's scope.

This paper will draw on the *Students for Fair Admissions* affirmative action cases and on *Merrill v. Milligan*, a Voting Rights Act (VRA) case that heavily implicates disparate impact liability's status.[10] Each section will address a different part of the equal protection analysis by both giving a background of the Court's recent, relevant jurisprudence and discussing the signals

[6] *Ricci*, 557 U.S. at 595 (Scalia, J., concurring).
[7] *Id.*
[8] *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700–01 (2017) (applying a remedy that struck a part of a federal statute found unconstitutional).
[9] *See, e.g.*, Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 541 (2015) (reading a statute as constitutional if it was applied in a limited way).
[10] *See* Students for Fair Admissions, Inc. v. Presidents and Fellows of Harvard Coll., No. 20-1199 (U.S. argued Nov. 1, 2022); Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. argued Oct. 31, 2022); Merrill v. Milligan, No. 21-1086 (U.S. argued Oct. 4, 2022).

in this term's cases.

Although some members of the Court may wish to do away with disparate impact liability this term, a few more reserved Justices will likely keep that from happening. However, this term will probably see a significantly narrowed reading of disparate impact liability under the VRA, which could also ripple into the Fair Housing Act and Title VII of the Civil Rights Act.

I. RACIALLY-MOTIVATED DECISIONMAKING

Some regulated parties try to avoid disparate impact liability by implementing race-conscious, race-neutral policies that promote equitable outcomes or by considering whether existing policies have a disparate impact and, if so, whether those policies are necessary.[11] Some of the statutes that impose disparate impact liability have prohibitions on racial classifications baked in; for instance, the Fair Housing Act and Title VII both prohibit disparate treatment along with disparate impact.[12] The Voting Rights Act also prohibits abridgement of the vote based on race,[13] although its prohibition on racial considerations is perhaps less explicit than those in the FHA and Title VII.[14]

[11] For instance, the EEOC published guidance on permissible uses of criminal legal history to avoid disparate impact liability. EEOC, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, § V (Apr. 25, 2012). The consideration of disparate impact, business necessity, and less discriminatory alternatives comes from the test used in disparate impact litigation, as established in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The Court applied the test to the Fair Housing Act context in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 543–45 (2015). Voting Rights Act litigation uses a different test established in *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). That test asks the challenger to show that the minority group is sufficiently large and compact to constitute an additional district; that voting is racially polarized; and that the majority group has dominated the vote. *Id.* If those conditions are met, the Court then must consider under the totality of the circumstances whether the map denies equal opportunity. *Id.* at 80. The test resembles the burden-shifting tests of the FHA and Title VII because it requires a showing of impact and a showing of lack of justification under the circumstances. *See* Transcript of Oral Argument at 25, *Merrill v. Milligan* (No. 21-1086) [hereinafter *Milligan* Oral Argument Transcript].

[12] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (applying disparate treatment liability under Title VII of the Civil Rights Act); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1043 (2d Cir. 1979) (applying disparate treatment liability under the Fair Housing Act). Indeed, *Ricci* was a disparate *treatment* case; the Court did not reach the equal protection claim. Ricci v. DeStefano, 557 U.S. 557, 563 (2009).

[13] Voting Rights Act, 52 U.S.C. § 10101(a)(1).

[14] Justice Jackson made the point during the oral arguments in *Merrill* that the Voting Rights Act is, in her view, a "race-conscious effort." *Milligan* Oral Argument Transcript, *supra* note 11, at 59.

As Justice Kagan pointed out in the oral arguments for *Students for Fair Admissions v. University of North Carolina*,[15] state action intended to discriminate violates the Equal Protection Clause even if it lacks an overt racial classification, unless it can satisfy strict scrutiny.[16] The *Ricci* court appeared to hold that eliminating a policy because of its racial effects can be prima facie disparate treatment, and by extension, an equal protection violation.[17] The facts were unfavorable to the defendant.[18] The City of New Haven announced it would use a written exam to make promotions in the fire department.[19] When it came to light that white and Hispanic members performed better than Black members and would be disproportionately promoted, community outrage ensued.[20] Fearing disparate *impact* suits, the town threw out the exams.[21] A group of white and Hispanic firefighters sued, alleging disparate *treatment*.[22]

The Court stated unequivocally in *Ricci* that just as it is impermissible for an employer to choose employees based on their race, it is impermissible too for an employer to engineer the hiring process to achieve certain racial outcomes.[23] However, the Court also appeared to rely heavily on the plight of the white and Hispanic firefighters.[24] *Ricci* therefore could have been

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[15] Transcript of Oral Argument at 14, *Students for Fair Admissions v. UNC* (No. 21-707) [hereinafter *UNC* Oral Argument Transcript].

[16] For instance, in *Hunter v. Underwood*, the Court invalidated a provision of the Alabama constitution that disenfranchised anyone convicted of a crime of moral turpitude; although the law made no racial classification, the Court thought the State adopted it with the *intent* of disenfranchising Black people and found it violated equal protection. 471 U.S. 222, 231 (1985).

[17] *Ricci*, 557 U.S. at 579 ("Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense."); *see also id.* at 594 (Scalia, J., concurring) (pointing out that the behavior challenged would presumably also violate the Equal Protection Clause).

[18] *See* Richard A. Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1369–74 (discussing the theory that *Ricci* may have been decided in part or in whole because of the visible victims in the case).

[19] *Ricci*, 557 U.S. at 583 ("As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests.").

[20] *Id.* at 562.

[21] *Id.*

[22] *Id.* at 563.

[23] *Id.* at 584 ("If an employer cannot rescore a test based on the candidates' race, then it follows *a fortiori* that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates . . . ." (citation omitted)).

[24] *Id.* at 585 ("Nor do we question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions . . . . But once that process has been established[,] . . . they may not then invalidate

limited to its facts or facts like it: Where an identifiable class of people were harmed by a change in a policy on which they had relied, the Court would be more concerned about the remedial racial intent behind the change.[25]

In an apparent limitation of *Ricci* to its facts, the Roberts Court often holds out race-neutral approaches as a panacea.[26] However, that admiration for race-neutral policies may not limit *Ricci* as much as it initially appears. The daylight between the narrow support for race-neutral options in *Parents Involved* and the broad support for a race-neutral alternative in *Fisher* is a clue to why the Court might prefer some, but not all, race-neutral options and even excuse some from equal protection scrutiny. [27]

Justice Kennedy's *Parents Involved* concurrence saved race-neutral responses to de facto public-school segregation.[28] He and the plurality disagreed over whether remedying societal segregation constituted a compelling interest.[29] Since Justice Kennedy thought it did, he could say that race-neutral remedies targeting such segregation were narrowly tailored.[30] No one contested

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the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race."); *see also* Primus, *supra* note 18, at 1373.

[25] Primus, *supra* note 18, at 1373–74.

[26] The attachment to race-neutral options has been particularly prominent in the affirmative action context. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 385 (2016) (excusing the university from exhausting all race-neutral possibilities, while holding those possibilities out as preferable if they could have accomplished the university's goals); *see also* Reva Siegel, *Race Conscious but Race Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 656 (2015). Siegel argued, compellingly, that *Fisher* represented a limitation on how far the Roberts Court would take *Ricci*'s holding; this paper focuses on how that picture may have changed since 2015.

[27] *Fisher*, 579 U.S. at 385; Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring in part) (arguing that race neutral remedies are permissible for school districts that wish to "bring[] together students of diverse backgrounds and races").

[28] *Compare Parents Involved*, 551 U.S. at 788–89 (Kennedy, J., concurring in part) (arguing for race-neutral methods of redress for societal segregation in schools), *with id.* at 733 (majority opinion) (arguing that public schools have no compelling interest that could justify race-conscious districting), *and id.* at 735 (arguing that even if there is a compelling interest, schools must *try* to achieve it with race-neutral methods).

[29] *Parents Involved*, 551 U.S. at 791 (Kennedy, J., concurring in part) (asserting that there is a compelling interest in bringing together diverse students); *see also id.* at 838 (Stevens, J., dissenting) (asserting a compelling interest in integration).

[30] *Id.* at 788–89 (Kennedy, J., concurring in part) (listing several race-neutral remedies that, in his view, would satisfy narrow tailoring). This paper discusses narrow tailoring in more detail in section III.

that those remedies would be subject to strict scrutiny, however. In *Fisher*, on the other hand, the Court split over race-classifying college admissions but not over the University of Texas's race-neutral Ten Percent Plan.[31] Even the dissenters argued that the holistic review process considering race could not be narrowly tailored when the university could use the Plan to fill the whole class.[32] The Plan was dissimilar from Kennedy's race-neutral districting options in one key way: It could have been adopted for and justified by other reasons "unrelated" to race, like the pursuit of socioeconomic diversity.[33] Thus, it escaped equal protection scrutiny altogether.

In sum, the Court believes that unjustified race-based decisionmaking violates the Equal Protection Clause, whether it involves race classifications or not. "Race-based decisions" include decisions to adopt or eliminate broad policies, even with the intent to avoid disparate racial outcomes. But such decisions may avoid Fourteenth Amendment scrutiny if they aim at other, permissible goals unrelated to race. The Fourteenth Amendment applies only to state actors, but it might be implicated if Congress compels private conduct that would be illegal as state action.[34]

Turning to the 2022–2023 Term, the *SFFA* cases demonstrated the Justices' ongoing commitment to the idea that any decisionmaking intended to have racial effects falls under the purview of Fourteenth Amendment scrutiny, unless there are other, more favored justifications that could fully explain the decision.[35] Increased scrutiny of race-neutral admissions policies could

[31] *Fisher*, 579 U.S. at 379 (noting the artificial nature of the inquiry into the university's holistic admission to the exclusion of the Ten Percent Plan but arguing that the plan "cannot much be criticized" in any case); *id.* at 392 (Alito, J., dissenting) (speaking supportively of the Ten Percent Plan as an alternative to the holistic admissions challenged in the case).

[32] *See id.* at 392 (Alito, J., dissenting).

[33] The Court has expressly adopted the idea that race being a partial motivator does not automatically indicate a violation of the Equal Protection Clause if the state actor would have adopted the same policy without race as a motivator. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 278–80 (1979) (applying this principle to sex discrimination).

[34] *See* Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) ("[I]f the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties—e.g., employers, whether private, State, or municipal—discriminate on the basis of race." (citations omitted)).

[35] *See supra* notes 31–33 and accompanying text.

ensure that *Ricci* goes beyond its facts to put *any* policy decisions or changes motivated by a desire to dispose of racially inequitable methods in the crosshairs. Disparate impact liability is on dangerous footing.

In a colloquy with Justices Kavanaugh and Kagan, the advocate for SFFA argued that, assuming *Grutter*'s allowance of race-classifications was overruled, universities would be able to adopt race-neutral but race-conscious policies only if they could show that they were narrowly tailored to the university's legitimate interests *or* that they would have been adopted even without the race-conscious motivation.[36] The advocate appeared hesitant to take that plunge, given that SFFA's argument focuses on racial classifications.[37] Contrarily, SFFA pointed to Harvard's legacy admissions, which disproportionately benefit white students, and argued that Harvard cannot use back-end race discrimination to make up for its refusal to abandon its legacy program.[38] However, *Ricci* and SFFA's asserted interpretation of the Fourteenth Amendment might mean that a choice to *end* the legacy admissions program would be subject to strict scrutiny.[39] Some Justices, at least, seemed concerned about that outcome; Justice Kavanaugh asked skeptically whether a university using racial diversity as a tiebreaker to choose between three good policies would constitute race-

[36] *UNC* Oral Argument Transcript, *supra* note 15, at 14–17.

[37] For instance, the discussion with Justices Kagan and Kavanaugh is instigated by the advocate claiming that racial classifications get a different constitutional analysis. *Id.* at 14 ("[I]t's a different analysis . . . when the mechanism that's chosen is not a racial classification itself . . . .").

[38] Transcript of Oral Argument at 5, Students for Fair Admissions, Inc. v. Presidents and Fellows of Harvard Coll., No. 20-1199 (U.S. argued Nov. 1, 2022) [hereinafter *Harvard* Oral Argument Transcript].

[39] Although the affirmative action cases do not involve disparate impact liability and are not the focus of this paper, extending the facts of *Ricci* to Harvard's legacy admissions program casts serious doubt on the universities' ability to continue race-conscious admissions if *Grutter* is overruled. As in *Ricci*, for Harvard to eliminate its legacy admissions program would disadvantage some individuals who acted in reliance on a stated policy (i.e., parents who donated to the school in hopes of increasing their children's chances of admission). *But see* Reply Brief for Petitioners at 25, *Students for Fair Admissions v. Harvard* (No. 20-1199) (arguing that Harvard's use of race-classifying admissions cannot be justified by a need to maintain the legacy program). And like the town in *Ricci*, Harvard would eliminate the legacy program because it did not like the racial outcomes of the program. Thus, an expansive reading of *Ricci* might put Harvard in a difficult bind of being forced to keep its legacy admissions program despite its racial effects and no longer being able to offset those effects with race-conscious admissions.

based decisionmaking.[40] Justice Kavanaugh's question may have been motivated by *Fisher*-like logic: If each policy was suitable, the fact that racial consideration helped select among them should not subject the decision to exacting scrutiny.

The State's argument in *Merrill* centered on the contention that broad application of disparate impact liability would require the State to take race into account in its districting process.[41] Everyone agrees that a state's choice to consider race in redistricting makes the state subject to heightened equal protection scrutiny.[42] Race-neutral alternatives have not been the focus in VRA debates as they have in affirmative action cases; rather, the discussion has focused on justifications for race classifications.[43] The Court could thus possibly find that the VRA's effects test is unconstitutional because it often requires racial classification, while leaving disparate impact under the FHA and Title VII untouched when they require a regulated party to consider, but not classify by, race.[44]

There is one strand worth noting between *SFFA* and *Merrill*. A primary point of discussion in *Merrill* was the use of traditional districting criteria, particularly the preservation of communities of interest and core retention for incumbents.[45] Justice Sotomayor, however, noted that immunizing such principles from challenge entrenches racial segregation that motivated

[40] *UNC* Oral Argument Transcript, *supra* note 15, at 14–15. The advocate responded somewhat haltingly that it would. *Id.* at 15.

[41] *See, e.g.*, *Milligan* Oral Argument Transcript, *supra* note 11, at 5 (arguing that Section 2 cannot require Alabama to draw "district lines dividing black and white with such racial precision that Alabama could never have constitutionally drawn those lines in the first place").

[42] *See, e.g.*, Cooper v. Harris, 137 S. Ct. 1455, 1564 (2017).

[43] The only Justice to meaningfully push back on this paradigm was the newly seated Justice Jackson. *See UNC* Oral Argument Transcript, *supra* note 15, at 174.

[44] Zooming out from the permissiveness of the Court towards parties attempting to avoid statutory and constitutional liability, *Congress's* ability to maintain disparate impact liability under the VRA might be in question if its implementation almost always requires express racial considerations in policymaking. By comparison, many employment and housing efforts to avoid disparate impact do not involve racial classifications; if the Court thinks the way regulated parties conduct themselves under the FHA and Title VII are more often permissible under the Equal Protection Clause, it may see the imposition of liability as less constitutionally problematic.

[45] *See, e.g.*, *Milligan* Oral Argument Transcript, *supra* note 11, at 75.

historic districting choices.[46] The furthest extension of *Ricci* might make suspect even a state's choices to change its traditional (nonracial) districting criteria to avoid the unequal opportunity prohibited by the VRA.[47]

If the Court thinks that many or all the methods regulated parties use to avoid disparate impact liability run afoul of what the Fourteenth Amendment requires, it may be skeptical of the legitimacy of such liability. The biggest danger is for the Court to endorse the idea that changes in policy around race-charged areas are inherently suspect as race-motivated decisionmaking, because such a finding would generate constant conflict between disparate impact and equal protection.

Chief Justice Roberts and Justices Thomas and Alito might be game for such a holding, given their participation in Roberts's dissent in *Inclusive Communities Project*, which heavily implied that disparate impact liability was unconstitutional.[48] However, Justice Gorsuch seems amenable to excluding at least some race-neutral policy choices from scrutiny,[49] and Justice Kavanaugh takes a *Fisher* tack of supporting policies that have nonracial justifications.[50] All of the Justices must agree that some race-neutral policies come under equal protection scrutiny; no one is likely looking to overturn *Underwood*. The Court may come down on evaluating the race-neutral *justifications* for race-neutral policies and bypassing equal protection scrutiny for policies whose justifications strike the Court as reasonable.

Because such a holding would make impermissible some, but not all or even most, of the

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[46] *Id.* at 90.

[47] Indeed, while *Ricci* hedges itself to specifically allow for affirmative choices to avoid racially disparate impacts, it does appear to provide fodder for challenges to any decision to end policies with racially disparate outcomes. Ricci v. DeStefano, 557 U.S. 557, 585 (2009) (clarifying that an employer could still take "affirmative efforts to ensure that all groups have a fair opportunity").

[48] *See* Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 555 (2015) (Roberts, J., dissenting).

[49] *See Harvard* Oral Argument Transcript, *supra* note 38, at 23.

[50] *See UNC* Oral Argument Transcript, *supra* note 15, at 14–15.

actions parties take to avoid disparate impact liability,[51] it seems more likely to lead to a limiting reading of disparate impact statutes to *avoid* the Constitution than to a constitutional bar on disparate impact liability.[52] In the housing and employment contexts, such a finding could be problematic because regulated parties often have open, candid plans to promote diversity and avoid disparate impact liability.[53] Regulated parties would be responsible for disparate impacts of their policies but not allowed to adjust policies because of racial outcomes. However, such a holding would not be catastrophic; parties have long known that disparate impact liability cannot justify egregiously racial decisionmaking.[54]

II. COMPELLING INTERESTS

Since *Ricci* only presented a Title VII disparate treatment challenge, the Court held that disparate impact avoidance would provide a "business necessity" justification for disparate treatment if and only if there was "a strong basis in evidence" that the defendant would have faced disparate impact liability if they had not taken the race-based action.[55] The Court declined to

[51] Because most statutes that include a proscription on disparate impact also prohibit disparate treatment, *see supra* note 13, regulated parties already walk a fine line that encourages the adoption of policies with multiple benefits beyond the promotion of racially equitable outcomes.

[52] The Court took this approach in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 541 (2015), when it chose to limit disparate impact liability under the Fair Housing Act in order to avoid constitutional problems. However, the vote was 5-4, and Justice Kennedy, who authored the majority, has since left the Court, and the Court majority has shifted right. One conceivable additional limitation, suggested by Justice Scalia's concurrence in *Ricci*, is to broaden the range of justifications defendants could make beyond "necessity." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring in part).

[53] For instance, innumerable popular resources exist informing employers on how to hire for diversity. *See, e.g.*, Aline Holzwarth, *How to Actually Hire for Diversity*, FORBES (Feb. 18, 2021), https://www.forbes.com/sites/alineholzwarth/2021/02/18/how-to-actually-hire-for-diversity/?sh=65e9984646f9; TULSA REG'L CHAMBER, A TOOLKIT FOR RECRUITING AND HIRING A DIVERSE WORKFORCE (2013), https://tulsachamber.com/clientuploads/PDFs/Mosaic%20best%20practices/1-Toolkit-for-recruiting-and-hiring-a-diverse-workforce2.pdf. Additionally, administrative agencies often issue guidance on how to avoid liability for disparate impact, including considering the racially disparate impact of different practices. *See, e.g.*, U.S. DEP'T OF HOUS. & URB. DEV., IMPLEMENTATION OF THE OFFICE OF GENERAL COUNSEL'S GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 4–8 (June 10, 2022).

[54] The Court first addressed the tension between the two and established the "strong basis in evidence" balance in *Ricci*, but the "disparate treatment" element of the statutes far predated that case. *Ricci*, 557 U.S. at 585.

[55] *Id.* at 585.

consider whether a similar justification would hold for equal protection purposes.[56] However, at least in the VRA context, the Court has long held that avoidance of VRA liability constitutes a compelling interest to justify prima facie equal protection violations, using the same "strong basis in evidence" test put forth in the Title VII context of *Ricci*.[57]

The question shifts when thinking about disparate impact *liability*, as opposed to disparate impact liability *avoidance* by regulated parties. It seems easier to say that in some cases, a regulated party subject to the Equal Protection Clause (such as a municipal government) has a compelling interest in avoiding liability.[58] The harder question is whether Congress has an interest that can justify imposing such liability and thereby forcing private parties to justify race-based decisionmaking.

Some of the Justices think Congress has a clear interest in encouraging race-neutral but race-conscious decisionmaking intended to increase diversity in, for instance, the workforce. Justices Kagan and Sotomayor have expressed support in past opinions for the effects-focused equal opportunity provisions of the VRA.[59] In their view, the effects test can be justified by a compelling interest in rooting out longstanding patterns of discrimination.

None of the current Court members joined Justice Scalia's dissent in *Ricci*, which specifically articulated a belief that disparate impact liability conflicted with the Equal Protection Clause.[60] However, some have expressed skepticism about the continued necessity of strict

[56] *Id.* at 582.

[57] Cooper v. Harris, 137 S. Ct. 1455, 1564 (2017) (applying the exact same standard to consider whether compliance with the VRA's effects test constituted a business necessity for *equal protection* purposes). The standard was first applied to the VRA in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015).

[58] *See id.* at 1464.

[59] *See, e.g.*, Merrill v. Milligan, Nos. 21-1086 & 21-1087, slip op. at 7 (U.S. Feb. 7, 2022) (order granting certiorari) (Kagan, J., dissenting).

[60] *Ricci*, 557 U.S. at 594 (Scalia, J., concurring in part).

disparate impact laws.[61] If the law addresses a problem that they think no longer exists, the laws would not be justified by a compelling interest. In the oral arguments for *Merrill*, the State invoked the fact that Alabama has a higher voter registration rate among Black voters than many other states.[62] The implication was that voter discrimination has abated enough that sweeping regulation of "unintentional" discrimination are no longer justified.[63] Instead, the State claimed, the only compelling interest in play was preventing intentional or egregious discrimination.[64]

Everyone seems to agree that Congress has a compelling interest in preventing the suppression of Black votes.[65] If the interest is framed that way, the operative question is whether disparate impact liability is narrowly tailored to the interest. Alternatively, one could frame the compelling interest as smoking out hidden discriminatory motives and discouraging the continuation of practices that entrench discriminatory results.[66] The Justices disagree on whether these are compelling interests.[67] For instance, Justice Thomas appeared skeptical in the *Merrill* oral arguments that it was appropriate to set a racially balanced baseline and then compare the effects of different policies against that baseline.[68] And given the Court's holding in *Shelby County v. Holder*, several members of the Court seem to see voting discrimination as a fading

[61] For instance, in *Shelby County v. Holder*, 570 U.S. 529, 547 (2013), Chief Justice Roberts, joined by Justices Thomas and Alito (and Justices Kennedy and Scalia, who are no longer on the Court) noted that voter registration rates by race in the subject county were "approaching parity," while striking down a major provision of that Act. Justice Alito also expressed skepticism about the continued need for strict fair housing laws in his dissent for *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, which Chief Justice Roberts, Justice Thomas, and the late Justice Scalia joined. *See* 576 U.S. 519, 555–56 (2015) (Alito, J., concurring).

[62] *Milligan* Oral Argument Transcript, *supra* note 11, at 44.

[63] The advocate, for instance, averred that the Court was now dealing with "third-generation" claims, implicating that such claims are far separated from the original harms the VRA (permissibly) addressed. *See id.* at 45.

[64] *See id.* at 13, 45.

[65] *See, e.g.*, *Shelby Cnty.*, 570 U.S. at 536 ("[V]oting discrimination still exists; no one doubts that."). It would be hard to deny that Congress has some interest in preventing voting discrimination given its express grant of enforcement power over the Fifteenth Amendment. U.S. Const. amend. XV.

[66] *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 595 (2009) (Scalia, J., concurring in part) (noting this possible interest in disparate impact liability).

[67] *See id.*

[68] *UNC* Oral Argument Transcript, *supra* note 15, at 6–7.

phenomenon.[69] It is fair to assume that the compelling interest the whole Court can agree on is the former, broader interest of preventing suppression of Black votes.

Given some of the Court members' skepticism about the compelling interests in remedying "societal" discrimination,[70] even a Court that approves the prevention of voter discrimination as a compelling interest may not see remedying private discriminatory decisions in housing and employment as compelling. Justice Thomas, at least, has expressed a belief that Congress is not justified in its concern about racially skewed *outcomes* in housing.[71] The 2022–2023 Term will likely provide little addition information about what the Court might think of Congress's interest in preventing housing and employment discrimination.

III. NARROW TAILORING

To summarize, the Court may conclude that some, but not all, race-neutral policies intended to avoid disparate impact prima facie violate the Equal Protection Clause. Specifically, if a policy could be explained and motivated by other interests, it may be outside of the purview of the Equal Protection Clause. Since regulated parties avoid disparate impact liability through varied methods, only some of which will fall inside the Clause's scope, the Court is unlikely to say that disparate impact liability is *per se* unconstitutional. Instead, they will read disparate impact liability narrowly to avoid a constitutional issue. Such a reading may still substantially damage plaintiffs' prospects.

To satisfy strict scrutiny, Congress needs to justify regulated parties' actions that are within the purview of the Fourteenth Amendment (race-based decisionmaking) and are required for those

[69] *See Shelby Cnty.*, 570 U.S. at 535 ("[T]he conditions that originally justified [VRA preclearance] no longer characterize voting in the covered jurisdictions.").

[70] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 731 (2007) ("[R]emedying past societal discrimination does not justify race-conscious government action.").

[71] Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 553–54 (2015) (Thomas, J., dissenting).

regulated parties to avoid disparate impact liability.[72] Assuming Congress has a compelling interest in preventing the kind of subtle discrimination that such actions address, the last question is how the Court will limit disparate impact liability to ensure that it is narrowly tailored to the relevant compelling interest, depending on the statute at hand.[73] An extreme approach would be for the Court to hold that disparate impact liability is per se not narrowly tailored to a compelling interest and find it unconstitutional. However, along with the liberal wing of the Court, Justices Kavanaugh and Barrett seem hesitant to go so far.[74] Because the Court's decisions carve out actions undertaken to avoid disparate impact liability that would not run into the Fourteenth Amendment at all,[75] the Court will more likely limit the bounds of disparate impact liability so that it (1) compels race-based decisionmaking infrequently and, (2) when it does, it compels such decisionmaking only as needed to achieve Congress's compelling interest.

Many current members of the Court have expressed that disparate impact liability must be appropriately limited to avoid constitutional questions, although they may disagree radically on what narrow tailoring looks like.[76] The limitations can come both at the prima facie (or precondition) stage and the justification (or totality-of-the-circumstances) stages.[77]

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[72] To see why the overlap between these categories is the policy that Congress must say is narrowly tailored, consider the disjunction of the two categories. Behaviors necessarily taken to comply with disparate impact requirements but that do not constitute race-based decisionmaking need not be justified because they do not fall under the Fourteenth Amendment's purview. Behaviors that constitute race-based decisionmaking but are not required by disparate impact liability are just private behaviors unrelated to the statutes prohibiting disparate impact. Perhaps behaviors that are encouraged but not required by disparate impact liability lie in a gray area.

[73] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (laying out the narrow tailoring requirement).

[74] *See Milligan* Oral Argument Transcript, *supra* note 11, at 52, for an example of Justice Barrett seeming to support the continued existence of some disparate impact liability, at least in the VRA context. *See supra* notes 39–40 for a discussion of Kavanaugh's apparent skepticism.

[75] *See supra* text accompanying notes 51–54.

[76] For instance, two of the Court's current members joined Justice Kennedy's opinion in *Inclusive Communities Project*, 576 U.S. at 541 (expressing a limiting principle on disparate impact liability to comply with constitutional mandates).

[77] *See id.* at 539–42 (discussing limitations at both stages of the disparate impact analysis); Ricci v. DeStefano, 557 U.S. 557, 563 (2009) (expressing that disparate impact and disparate treatment must be balanced). In the VRA context, see *Thornburg v. Gingles*, 478 U.S. 30, 48–51 (1986) (describing how effects liability is limited both in the showing of the effect and in the justifications the state may offer).

The oral arguments in *Merrill* focused largely on the first *Gingles* precondition, which requires production of a map that includes an additional majority-minority district while complying with traditional districting principles.[78] The parties quarreled over whether the comparator map at that stage could be one that was drawn *with the specific goal* of producing an additional majority-minority district, that is, whether it could be "racially gerrymandered."[79] That debate echoes, in some ways, previous contentious issues discussed in *Wards Cove v. Atonio* and *Inclusive Communities Project*, where the Court expressed skepticism about finding even a prima facie case of disparate impact based on a "mere" statistical imbalance.[80] In the *Merrill* oral arguments, Justice Thomas expressed concern about the difficulty of identifying a comparator for the VRA's effects test.[81] The Court could pull back disparate impact to allow a prima facie (or precondition) case only when the disparity is particularly egregious or produced by procedural irregularities; indeed, many lower courts have interpreted the holding in *Inclusive Communities Project* to do just that in the fair housing context.[82] Or, the Court might lean more deeply into the idea that disparate impact liability is intended to "smoke out" intentional discrimination, not to target truly unintentional discrimination.[83] Such a reframing might significantly narrow the options for plaintiffs in discrimination cases by requiring at least an implication of intent.

Additionally, at the justification or totality-of-the-circumstances stage, the Court may soften its requirement that disparate impacts be justified by "necessity." In his *Ricci* dissent, Scalia

[78] *See, e.g.*, *Milligan* Oral Argument Transcript, *supra* note 11, at 11. This map shows the minority is large and compact enough to make up an additional district. *Id.*

[79] *Id.* at 4.

[80] *Inclusive Communities Project*, 567 U.S. at 542 (finding that a "mere statistical disparity" insufficient to establish disparate impact); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 655 (1989) (same).

[81] *Milligan* Oral Argument Transcript, *supra* note 11, at 6–7.

[82] *See, e.g.*, Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 906 (5th Cir. 2019).

[83] *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 595 (2009) (Scalia, J., concurring in part); *see also Milligan* Oral Argument Transcript, *supra* note 11, at 13 (arguing, on behalf of the State, that intent is "not irrelevant" to the effects test).

worried over this high bar. Even if disparate impact survives equal protection scrutiny, the argument goes, it is unacceptable to require a showing of *necessity* by the defendant rather than allowing them simply to show that their justifications are *genuine*. The Court may take an expansive view of what justifications suffice for the creation of disparate impacts; for instance, many Justices seemed comfortable accepting Alabama's contention that core retention was a nonnegotiable districting principle.[84]

Race classifications have not been widely used in housing, employment, or voting (as they have in higher education admissions) because the antidiscrimination statutes also explicitly prohibit them.[85] The likely outcome in *SFFA*—prohibition of race classification in higher education admissions—is therefore not very helpful in seeing how disparate impact's narrow tailoring doctrine will develop. However, Justice Kavanaugh's concerns about what constitutes a permissible race-neutral remedy will likely come up again,[86] and the Court will be forced to articulate what kinds of race-neutral decisionmaking run afoul of the Fourteenth Amendment. The Court may cut away at the space between the Equal Protection Clause and disparate impact liability, while moving the line further towards avoiding racial decisionmaking, even at the expense of equitable, remedial outcomes.

CONCLUSION

Disparate impact liability has been in danger at the Supreme Court for some time, and while this term seems unlikely to kill it entirely, the Court will further constrict its reach in the name of equal protection. Because avoiding disparate impact liability sometimes requires regulated parties to make decisions based on racial outcomes, a substantial branch of the Court

[84] *See, e.g.*, *id.* at 67. Although, note that Justice Kavanaugh expressed some skepticism of core retention being untouchable as a principle. *See id.* at 50.

[85] *See supra* note 12 and accompanying text.

[86] *See supra* notes 39–40 and accompanying text.

sees disparate impact liability as sanctioning impermissible behavior and therefore as wholesale unconstitutional. However, there are likely enough members on the Court who do not see policies that reduce racial disparity, but can be fully motivated by other concerns, as constitutionally suspect. They will save disparate impact from being struck down completely, although they may be willing to substantially limit it. Most of the Justices probably think that smoking out intentional discrimination is a compelling interest at least in the voting context; whether they feel the same about housing and employment discrimination is a question for another term. Narrowly tailoring disparate impact to that interest may be where the Court reigns in its scope, specifically through its holding in *Merrill*. A sufficient portion of the Court appears skeptical of an equal openness jurisprudence that disregards intent entirely. This term could see much higher barriers at the prima facie stage and much broader justifications available to defendants.

Applicant Details

First Name	**Sean**
Middle Initial	**F.**
Last Name	**Healey**
Citizenship Status	**U. S. Citizen**
Email Address	**shealey@jd24.law.harvard.edu**
Address	**Address** Street **50 Follen St, Apt 307** City **Cambridge** State/Territory **Massachusetts** Zip **02138** Country **United States**
Contact Phone Number	**3155668006**

Applicant Education

BA/BS From	**Dalhousie University, Canada**
Date of BA/BS	**May 2018**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 25, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Sports and Entertainment Law** **Journal of Law and Technology**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Ames**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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4047278293

Stephanopoulos, Nicholas
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Hanson, Jon
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617-496-5207

Chiao, Vincent
vincent.chiao@utoronto.ca

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sean Healey

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June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write to apply for a clerkship in your chambers starting in 2024. As a rising 3L at Harvard Law School who grew up in Burlington, I am excited about the opportunity to return to Vermont after graduation.

Attached, please find my resume, law school grade sheet, undergraduate grade sheet, and writing sample. You will be receiving letters of recommendation from the following people:

Professor Nicholas Stephanopoulos
Harvard Law School
nstephanopoulos@law.harvard.edu
(617) 998-1753

Professor Jon Hanson
Harvard Law School
hanson@law.harvard.edu
(617) 495-3579

Professor Vincent Chiao
University of Toronto Faculty of Law
vincent.chiao@utoronto.ca
(416) 978-4901

Professor Margo Bagley
Emory University School of Law
mbagley@emory.edu
(404) 727-8293

I am an intellectually curious person with a passion for learning and a strong interest in how the legal system can make society more just. I have substantive experience with legal and persuasive writing and have observed and participated in a variety of court proceedings, both as a summer associate with AZA and through my externship with the Delaware DOJ's criminal prosecution unit.

I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely yours,

Sean F. Healey

Sean Healey

50 Follen St., Apt. 307, Cambridge, MA 02138
shealey@jd24.law.harvard.edu • (315) 566-8006

EDUCATION

Harvard Law School, Cambridge, MA
Juris Doctor, anticipated May 2024
Honors: Dean's Scholar Prize in Constitutional Law
Dean's Scholar Prize in The Rule and the Exception
Ames Upper-Level Moot Court, 2nd Overall Oralist in Phase II Qualifying Round
Activities: Government Lawyer: Attorney General Clinic, Delaware DOJ Criminal Division
Harvard Journal of Sports and Entertainment Law, Submissions Editor
Recording Artists Project

Dalhousie University, Halifax, NS, Canada
Bachelor of Arts, Honours in Philosophy, Minor in Law and Society, May 2018
Honors: First Class Honours and University Medal in Philosophy (first in program)
H.L. Stewart Memorial Scholarship
Activities: Undergraduate Philosophy Society, President
Corvus Undergraduate Philosophy Journal, Co-Editor in Chief

EXPERIENCE

Dovel & Luner, Santa Monica, CA
Summer Associate, May – July 2023
- Work closely with attorneys to draft arguments for high-stakes business litigation cases.
- Help prepare cross-examination questions for upcoming trial in "trial lab" exercises.

Harvard Law School, Cambridge, MA
Research Assistant to Professor Margo Bagley, November – December, 2022.
- Conducted research and created slides for 2022 UN Conference on Biodiversity.

Research Assistant to Professor Nicholas Stephanopoulos, August 2022
- Researched and wrote memorandum for anti-gerrymandering legislative proposal.

Ahmad, Zavitsanos & Mensing, Houston, TX
Summer Associate, May – July 2022; August 2023
- Conducted legal research and prepared hearing outlines for high-stakes litigation firm.
- Observed multiple hearings including a claim construction hearing and a TRO.
- Wrote patent validity analysis, sections of a response to a motion to dismiss, and a motion to seal.

Silver & Collins Attorneys at Law, Potsdam, NY
Legal Assistant, July 2019 – September 2020; September 2020 – present (remote)
- Research, prepare, and monitor trademark applications for a small, general-practice firm.
- Wrote letters, court documents, and forms for real estate transactions and litigation.

Healey Home Help, Pittsburgh, PA
Home Repair Contractor, August 2020 – August 2021
- Performed independent repair, assembly, and painting services for Pittsburgh-area clients.

Canton-Potsdam Hospital, Potsdam, NY
Monitor Tech / Unit Clerk, May 2018 – March 2020
- Monitored and interpreted EKG telemetry readings for 6-bed ICU and medical/surgical unit.

INTERESTS

- Songwriting, home recording, fiction writing, weightlifting, and running.
- Sound Designer and first chair guitarist for HLS Parody 2023.

Harvard Law School

Date of Issue: June 6, 2023
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Record of: Sean F Healey
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 6 Rubenstein, William	P	4
1001	Contracts 6 Bar-Gill, Oren	H	4
1002	Criminal Law 6 Rabb, Intisar	P	4
1006	First Year Legal Research and Writing 6B Doyle, Colin	P	2
1005	Torts 6 Hanson, Jon	H	4

Fall 2021 Total Credits: 18

Winter 2022 Term: January 04 - January 21

1055	Introduction to Trial Advocacy Newman, Thomas	CR	3

Winter 2022 Total Credits: 3

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 6 Stephanopoulos, Nicholas * Dean's Scholar Prize	H*	4
1006	First Year Legal Research and Writing 6B Doyle, Colin	H	2
1003	Legislation and Regulation 6 Renan, Daphna	H	4
1004	Property 6 Fisher, William	H	4
3039	The Rule and The Exception Chiao, Vincent * Dean's Scholar Prize	H*	2

Spring 2022 Total Credits: 16
Total 2021-2022 Credits: 37

Fall 2022 Term: September 01 - December 31

2048	Corporations Catan, Emiliano	P	4
2293	Drug Product Liability Litigation Grossi, Peter	P	2
2197	Patent Law Bagley, Margo	H	3
2237	The Role of the State Attorney General Tierney, James	H	2
2319	Theories About Law Sargentich, Lewis	H	2

Fall 2022 Total Credits: 13

Winter 2023 Term: January 01 - January 31

8015	Government Lawyer: Attorney General Clinic Tierney, James	H	2

Winter 2023 Total Credits: 2

Spring 2023 Term: February 01 - May 31

2050	Criminal Procedure: Investigations Jain, Eisha	H	4
3107	Critical Corporate Theory Lab Hanson, Jon	H	2
2212	Public International Law Blum, Gabriella	H	4
2009	Quantitative Reasoning Yang, Crystal	H	3

Spring 2023 Total Credits: 13
Total 2022-2023 Credits: 28

Fall 2023 Term: August 30 - December 15

2035	Constitutional Law: First Amendment Feldman, Noah	~	4
2086	Federal Courts and the Federal System Field, Martha	~	5
2834	Nietzsche for Lawyers Parker, Richard	~	2
2526	Philosophical Analysis of Legal Argument: The Logocratic Method in an Uncertain Time Brewer, Scott	~	2
3065	Youth, Privacy, and Digital Citizenship Plunkett, Leah	~	1

Fall 2023 Total Credits: 14

Winter 2024 Term: January 02 - January 19

2249	Trial Advocacy Workshop Sullivan, Ronald	~	3

continued on next page

Assistant Dean and Registrar

Harvard Law School

Record of: Sean F Healey

Date of Issue: June 6, 2023
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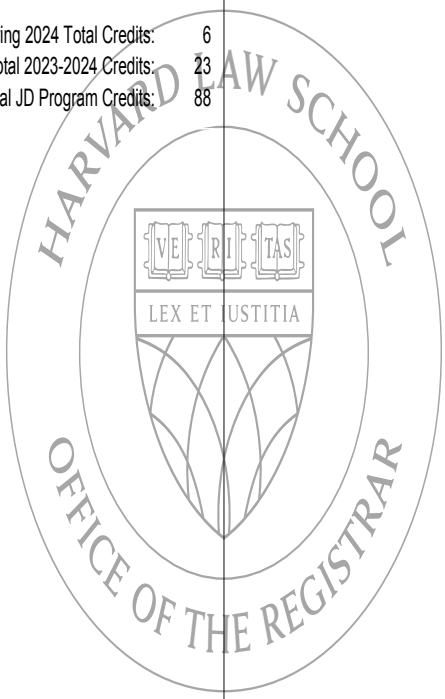
		Winter 2024 Total Credits:	3
	Spring 2024 Term: January 22 - May 10		
2079	Evidence Lvovsky, Anna	~	4
2169	Legal Profession: Complex Litigation Rubenstein, William	~	2
		Spring 2024 Total Credits:	6
		Total 2023-2024 Credits:	23
		Total JD Program Credits:	88

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
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Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems
Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

June 05, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:
Sean Healey has asked me to write a letter supporting his application for a position as a law clerk in your chambers following his graduation from Harvard Law School in 2024. It is my great pleasure to do so. Sean is an outstanding candidate: a bright, talented, mature, and productive law student who I truly believe will be an exceptional clerk.

I had the pleasure of getting to know Sean in the Fall of 2022 when he was both a student in my Patent Law class at Harvard Law School and my research assistant. In Patent Law, I was impressed by Sean's oral contributions to the classroom discussion with insightful questions and comments and enjoyed several conversations with him after class in which he further probed thought-provoking issues. His input and analysis demonstrated the kind of clear and orderly thinking that is so important for legal practice. His stellar performance on the final exam earned him a High Pass, a grade reserved for the top 15% of exam grades. Sean is clearly destined for a stellar legal career.

So many things about Sean are impressive, including his intelligence, personality, and good humor. But what truly wowed me was his work ethic. Sean has already won two Dean's Scholar prizes (for the top grade in a class) at Harvard and is involved with numerous extracurricular activities, including the Harvard Journal of Law and Technology, Submissions Editor for the Harvard Journal of Sports and Entertainment Law, the Recording Artists project, and the Ames moot court competition. His grades are exceptional, and he arguably did not need to do one more extracurricular thing to consider his 2L year at Harvard a success.

And yet, he did one more thing. When I announced during class that I was looking to hire a research assistant, Sean contacted me almost immediately to apply for the position, and I hired him. Sean quickly digested the background reading I assigned to bring him up to speed on my research areas, and then proceeded to impress me with each project he completed. Sean is in a small group of the brightest, most effective, and reliable research assistants I have worked with in my 20+ years in the legal academy. I say that having hired him mid-semester, so there was not as much time for him to work for me as most of my prior research assistants.

I worked with Sean mostly remotely, as I was commuting back and forth each week between Atlanta and Cambridge. Sean's work was incredibly good, his response time fast, and his ability to grasp what was needed virtually automatic. I was so impressed with his work product and work ethic that losing his assistance at the end of the semester was really a loss for me. I would still have him working for me now if I could! His work was superb and his ability to juggle my requests and his academic and other obligations was exceptional. I simply cannot express how pleased I was with Sean as a research assistant.

Sean's intellectual curiosity is one of his strongest traits and fuels his work ethic. He finds interest in so many things and people and has a thirst for knowledge that is inspiring. His experiences in a wide variety of positions, including starting his own home repair business, working in a recording studio, and in the Delaware prosecutor's office, have honed skills that will be extremely beneficial in a judicial clerkship and throughout his legal career. They also demonstrate his ability to effectively engage with people in all walks of life. Such work experience is immensely valuable in adding maturity, perspective, and interpersonal skills that will make Sean valuable as a clerk and aid his longer-term success in the legal field. Also, Sean's forthcoming summer litigation position at a highly respected law firm should give him important experience, enviable job prospects, and the opportunity to identify further his interests and strengths in the law.

Judge, I believe that you will find Sean to be a loyal and intellectually stimulating colleague, as well as an intelligent and exceptionally diligent one. Sean is talented, focused and mature, with strong organizational skills and a pleasant, courteous personality. In light of Sean's exceptional intellectual and personal qualities, I am fully confident that he will excel in fulfilling his clerkship duties and will be an outstanding clerk. I am delighted to recommend him for a clerkship in your chambers.

Please contact me by phone (404-831-6634) or email if you would like more information about Sean or if I can otherwise be of assistance to you.

Sincerely yours,

Margo A. Bagley

Hieken Visiting Professor in Patent Law
Harvard Law School (Fall 2022)
Asa Griggs Candler Professor of Law
Emory University School of Law

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P: 404-831-6634

mbagley@law.harvard.edu

Margo Bagley - margo.a.bagley@emory.edu - 4047278293

June 06, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I'm writing to express my enthusiastic support for Sean Healey's clerkship application. Sean is a spectacular student, a clear and insightful writer, and an engaging young man. I'm confident that his superb legal skills, diligent work ethic, and warm personality will make him a first-rate clerk.

I got to know Sean in the spring term of 2022 when he took Constitutional Law with me: a highly demanding course that spans constitutional theory, history, and doctrine, and covers areas including federalism, the separation of powers, due process, and equal protection. Even in a class of eighty students, Sean's performance stood out. He was impeccably prepared whenever I called on him, and frequently volunteered his own incisive comments. He engaged deeply with the course's complex topics, approaching me, for example, to better understand the differences between the anticlassification and antisubordination theories of equal protection. And on the exam, he earned one of the very highest grades—and a coveted Dean's Scholar Prize—in a large class. Rereading his answers, I'm genuinely impressed by his command of the material and his ability to write crisply and convincingly under pressure. He clearly deserved his exceptional mark.

Sean subsequently served as one of my research assistants in the summer and fall of 2022. In that capacity, he wrote a memo on a pair of obscure federal statutory provisions—2 U.S.C. § 2a(c) and 2 U.S.C. § 2c—applicable to redistricting. Some scholars have argued that these provisions implicitly override claims by state legislatures to plenary authority over congressional redistricting because the provisions refer to district plans enacted pursuant to "the law" of each state. "The law" allegedly encompasses the entire lawmaking process of each state—including gubernatorial vetoes, court decisions, administrative actions, and voter initiatives—not just legislation. Sean's memo on this difficult topic was stellar. It was extremely clear and well-organized. It identified and nicely summarized all of the relevant scholarship and doctrine. It further drew on the legislative histories of the provisions to make entirely novel points: for example, that Congress had several opportunities to revise or repeal 2 U.S.C. § 2a(c) but instead chose to leave it in place. Based on this memo, I'm confident that Sean would excel in researching and writing about complex issues as a clerk.

Beyond his performance in my course and as my research assistant, Sean has compiled an enviable record at HLS. His grades in his other classes are top-notch, including another Dean's Scholar Prize. He is the Submissions Editor for the Harvard Journal of Sports and Entertainment Law and a Subciter for the Harvard Journal of Law and Technology. He qualified for the second stage of the Ames Moot Court Competition. He has participated in the Government Lawyer: Attorney General Clinic and the Recording Artists Project. And he has worked, or will work, at terrific places like Ahmad, Zavitsanos & Mensing and Dovel & Luner. I'm not at all surprised by these successes, and I expect many more to follow.

Please let me know if you have any further questions about Sean. Again, I recommend him unreservedly and believe he will be a wonderful clerk.

Sincerely,

Nicholas Stephanopoulos
Kirkland & Ellis Professor of Law

June 13, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write on behalf of Sean Healey, who has applied to you for a law clerk position. Sean is smart, amiable, level-headed, and a pleasure to work with. I am delighted to recommend him very highly and without reservation.

I met Sean in the Fall of 2021, when he was one of eighty students in my first-year torts course, and in the section for which I am faculty leader, "Section 6." Sean, who is somewhat reserved, managed nonetheless to make a host of invaluable contributions to the class and to our community. In class, he was engaged, prepared, and consistently on point with his responses and comments. He also asked several very thoughtful questions after class and during office hours, where he impressed me as mature, poised, and smart. I was not surprised to learn that Sean wrote one of the best exams in the class, for which he received an "honors" or "H."

Sean stood out in another way, as well, by demonstrating extraordinary leadership and teamwork skills in a project that I assign called "Tort Reports." The month-long assignment requires students to work in groups of five to conceptualize, design, and produce an eight-minute documentary about a current policy topic that does or could involve tort law or for which tort law (or some form of civil liability) could provide a partial solution. Students were assigned to their teams according to the policy problems that they selected. Sean participated on a team that examined the problems posed by the marketing and distribution of opioids. He and his team, together, produced an exceptionally strong documentary (https://youtu.be/njC-02fykaM), which was voted by current and former students to be one of the top four videos among the sixteen in the class.

Sean's contributions as a team member and leader were especially strong and greatly valued by his classmates, a fact that was made clear in an end-of-semester survey that provided students an opportunity to let me know if any one of their teammates made especially valuable contributions. Several of Sean's teammates went out of their way to praise Sean as the team MVP, as the following sample illustrates:

1. "Sean - he recorded an original score to use as the soundtrack to the Tort Report and recorded the narration."
2. "Sean Healey! He composed original music for the tort report and recorded all the voice-overs."
3. "Sean really pulled the whole draft together."

This spring, I had the pleasure of having Sean in another class, the Critical Corporate Theory Lab. The Lab is an unusual course. In it, the students are tasked as a group with running, expanding, promoting, and creating content for an online magazine, The law (theflaw.org). Each semester, roughly twenty-five students work together as one large group to make larger decisions about the magazine, in smaller working groups to manage more specialized tasks, and individually, in their reporting and writing for the magazine.

In all capacities, Sean was a valued and respected member of the class. For his own project, he wrote a superb article in which he tells the story of a community doctor who attempted to offer a service at an affordable price but soon found himself tangled in outdated state regulations and boxed out by a large hospital's strong-arm tactics and undue influence on state regulators. The well-written article reflects careful research and extensive reporting on Sean's part. In addition to his writing, Sean's contributions to his working group and the larger organization were also exceptionally strong. Again, in this class, I am able to verify my claims through the words of his classmates who were asked to complete a survey in which they let me know, among other things, if there is one student whose contributions to the team projects were especially valuable. Here is a sample of their replies regarding his invaluable contributions to the podcast working group:

1. "Sean also was incredibly dedicated to the team, and provided music and final touches for both the Donziger episode and the Ramseyer episode."
2. "Sean—always gracious with his time in producing/editing, and always committed to excellence while also being accommodating of different perspectives."
3. "I was really impressed with the way that Sean took ownership of the sound editing work!"

I agree with Sean's classmates. He's truly been a privilege to get to know and work with over the last two years. For all those reasons, I am confident that he would be a terrific law clerk and an invaluable asset in almost any chambers. I hope you will give Sean's application your serious consideration.

Sincerely,

Jon D. Hanson
Alfred Smart Professor of Law

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The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson,

I am writing on behalf of Sean Healey's application for a clerkship in your chambers. I met Sean when he enrolled in a seminar I taught at Harvard Law School in the winter of 2022. Sean obtained the highest mark in the course; indeed, he obtained the highest mark possible. I found his written work to be of an exceptional quality, and his contributions in class to be consistently on-point and insightful. I am confident that Sean would make an excellent law clerk and recommend him highly.

My recommendation stems from Sean's performance in my seminar, which focused on contrasting legal and ethical contexts in which adherence to clear, uniform rules is preferred and contexts in which case-by-case, contextual judgment is favored. Instead of assigning specific paper topics in my seminar, I require students to set their own topics within the constraints of a 2000-word essay. This approach fosters independent thinking as students determine their perspectives on arguments presented in the course materials and during the seminar.

Sean wrote three papers for my seminar, each of which showcased his exceptional writing and analytical skills. The first concerned how modern machine learning algorithms might affect the theory of particularism in moral philosophy; the second focused on the case for following a rule simply because it is a rule; and the third considered the potential role for algorithmic tools in criminal justice. Sean's papers were as good as I have ever seen, and I accordingly gave each of them the highest possible score. By way of comparison, I think his papers are at the level of what I would expect from our very strongest graduate students.

In re-reading his papers, I am struck by the consistently high level of originality, insight, and clarity that Sean brought to what are by any standard difficult and complex topics. Sean's papers displayed a very wide range of knowledge, making fluent use of concepts drawn from philosophy, social science, computer science and law. For instance, his paper on particularism demonstrated a familiarity with machine learning techniques such as backpropagation, whereas another paper revealed awareness with of how risk assessments are used in criminal law. Each paper sketched a very clear, well-reasoned line of argument, in addition to a charitable account of the strengths and limitations of his interlocutors' positions. Sean's clear and crisp writing enabled him to effectively convey sophisticated concepts, as demonstrated in his use of a mundane example from going to gym to provide an intuitive explanation for a subtle argument about the normativity of rules.

All the students in my seminar were highly motivated and sharp. Sean nonetheless stood out. He consistently provided insightful, relevant, and thought-provoking contributions during class discussions. I also chatted with Sean after class on several occasions, on topics ranging from the role of statistical reasoning in jury decision-making to the degree to which an AI tool can be described as "merely" following rules in correlating outputs with given inputs. It was quite clear from these interactions that Sean is both very bright and very knowledgeable. He is also, I am happy to say, very engaging and personable.

Speaking more generally, my impression is that Sean has an uncommonly wide-ranging set of interests and skills. He has started his own business; studied philosophy; and written, performed, recorded, and produced music. While a law student, he has taken time to work with local prosecutors, taken summer work in commercial litigation firms, worked on an academic journal, and conducted legal research. This suggests to me a level of motivation and self-direction consistent with being a judicial clerk, and with a career in public service, which is where Sean's longer-term ambitions lie.

Given what I have seen, I have every reason to believe that Sean has a very successful career ahead of him. He possesses a keen intellect and a restless curiosity, is a clear communicator, and is highly motivated. I believe Sean would be an excellent clerk and recommend him enthusiastically.

Yours,

Vincent Chiao

Sean Healey

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WRITING SAMPLE

The following is a case comment I wrote for my Harvard Law Review write-on application in May, 2022. It is my own work product and has not been substantially edited by anyone else.

Per the submission requirements, the comment summarizes and critiques the 2021 case *United States v. Smith*, 997 F.3d 215 (5th Cir. 2021). It was researched and written over the course of a week using a closed universe of background materials, with no outside research permitted. I have edited it for clarity and form.

A Presumption of Prejudice for Factual Basis Review?

In 1966, the Supreme Court amended Federal Rule of Criminal Procedure 11 to require that any guilty plea must be supported by a "factual basis."[1] Following *United States v. Vonn*,[2] the Fifth Circuit applies plain error review to factual basis appeals, overturning only plain errors that substantially affect defendants' rights and seriously affect the fairness of proceedings.[3] Generally, the defendant bears the burden of showing to a "standard of reasonable probability" that, but for the error, a guilty plea would not have been entered.[4] However, the Supreme Court has left substantial ambiguity as to when and how this standard it to be applied.[5] Recently, in *United States v. Smith*,[6] the Fifth Circuit held that a district court commits a reversible plain error when it accepts a defendant's "mere touching" of a firearm as the factual basis for a felon-in-possession guilty plea.[7] By overturning Smith's conviction despite a high probability of conviction at trial, the Fifth Circuit implicitly constructed a "presumption of prejudice" for guilty pleas—but the Court missed the opportunity to identify the presumption and clarify when it applies, leaving the doctrine in a state of uncertainty.

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[1] Steven Schmidt, Note, The Need for Review: Allowing Defendants to Appeal the Factual Basis of a Conviction After Pleading Guilty, 95 MIN. L. REV. 284, 287 (2010).

[2] 535 U.S. 55 (2002).

[3] Schmidt, *supra* note 1, at 296 n.91, 301.

[4] *Id.* (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004)).

[5] *See* Brent Ferguson, *Plain Error Review and Reforming the Presumption of Prejudice*, 44 N.M. L. REV. 303, 320 (2014) (explaining that some courts of appeals lift the burden on the defendant by "presuming that prejudice has occurred").

[6] 997 F.3d 215 (5th Cir. 2021).

[7] *Id.* at 224.

On May 13, 2019, Midland police arrested Trendon Smith "in reference to an evading charge" after he fled from officers.[8] At the police station, detectives questioned him regarding three firearms they had recovered the previous month, on April 6, during another investigation.[9] When detectives showed Smith pictures of the firearms, he identified one of them as a .38 caliber revolver, which he claimed to have "seen and touched . . . at a friend's house."[10] However, Smith's fingerprints were not on the firearm,[11] and officers released him.[12] Later, on July 9, 2019, Midland police arrested Smith fleeing the scene of a vehicle burglary;[13] apprehending him, officers discovered a glass-breaking tool in his pocket and several cuts and scratches on his hands.[14] Two firearms had been moved from the backseat of the burgled vehicle to the front.[15] Because Smith had a prior conviction, the government charged Smith with two felon-in-possession counts[16]: one for the weapons in the burgled car, and a second for the .38 revolver he had "touched."[17] Smith pleaded guilty to count (2), and in exchange the government dropped

[8] Factual Basis, United States v. Smith, No. 7:19-cr-00168-DC at 2 (W.D. Tex. Nov. 22, 2019)

[9] The officers "had been looking for [Smith] in reference to" that case, identified as US v. Collins, 19-CR-91. *Id.*

[10] *Id.*

[11] *Smith*, 997 F.3d at 220.

[12] *See* Factual Basis at 2. The factual basis does not state this directly, but Smith's arrest less than two months later indicates he did not remain in custody after questioning. *Id.* at 1.

[13] *Id.*

[14] *Smith*, 997 F.3d at 225 (Smith, J., dissenting).

[15] Factual Basis at 2.

[16] *See* 18 U.S.C. §922(g).

[17] *Smith*, 997 F.3d at 226 (Smith, J., dissenting).

count (1).[18] The District Court accepted Smith's guilty plea and sentenced him to 57 months' imprisonment.[19]

Smith timely appealed, and the Fifth Circuit reviewed his conviction.[20] Under Federal Rule of Criminal Procedure 11, a guilty plea must be supported by a factual basis establishing "that the conduct which the defendant admits constitutes the offense charged."[21] Smith argued that the mere "touch" to which he admitted did not establish the possession element of 18 U.S.C. § 922(g)(1), and therefore that the factual basis was insufficient.[22] Generally, a defendant may only appeal an error to which they objected in the lower court; but under Federal Rule of Criminal Procedure 52(b), a "plain error that affects substantial rights" may be appealed whether or not the error was preserved.[23] The Fifth Circuit applies plain error review to deficiencies in pleas.[24] Therefore, a guilty plea is only vacated if it resulted from (1) an error (2) that is "clear or obvious," (3) which affected the defendant's "substantial rights," and (4) "seriously affects the fairness, integrity, or public reputation of judicial proceedings."[25]

The Fifth Circuit vacated and remanded.[26] Writing for the panel, Judge Haynes held that the District Court plainly erred by accepting "mere touching" as sufficient to establish

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[18] *Id.*

[19] *Smith*, 997 F.3d at 218.

[20] *Id.*

[21] McCarthy v. United States, 394 U.S. 459, 467 (1969) (quoting FED. R. CRIM. P. 11, Notes of Advisory Committee on Criminal Rules).

[22] *Smith*, 997 F.3d at 219.

[23] Fed. R. Crim. P. 52(b).

[24] *See Smith*, 997 F.3d at 219.

[25] Puckett v. United States, 556 U.S. 129, 135 (2009)

[26] *Smith*, 997 F.3d at 218.

possession.[27] First, he stated that Smith's admission that he "touched" the weapon was the only evidence linking him to it.[28] Smith could have known the weapon's caliber without possessing it (by inference, perhaps), and there was no fingerprint or other forensic evidence.[29] Thus, he concluded, the factual basis was sufficient only if "mere touching" fell within the statutory meaning of "possession."[30] To answer this question, Haynes relied upon a combination of textual analysis and common law precedents.[31] First, finding no clarification within the statute itself, Haynes used dictionaries to establish the term's ordinary meaning, concluding that to possess an object one must "control" it or "be master of" it.[32] Therefore a "mere touch" could not possibly suffice for possession—any suggestion to the contrary would "wildly expand[]" the meaning of the term, such that one could be said to "possess" any object one came into contact with, even the "countertops at the grocery store."[33]

Next, Haynes observed that this control-based understanding of possession found additional support in the Fifth Circuit's precedents.[34] Responding to the dissent's argument that only *constructive*[35] possession requires control, Haynes pointed to Fifth Circuit precedents

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[27] *Id.*

[28] *Id.* at 220.

[29] *Id.* at 221.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 221 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1926 (2d ed. 1934).

[33] *Id.* at 222.

[34] *See Id.* at 219, 222 – 24.

[35] Constructive possession is a broader form of possession that includes "ownership, dominion, or control" over either the firearm itself or the property on which it is found. *Id.* at 219. The government did not allege constructive possession in this case. *Id.* at 226 (Smith, J., dissenting).

defining *actual* possession as "direct physical control."[36] He argued that for both types of possession, the Fifth Circuit had consistently demanded something more than mere touching.[37] Lastly, he listed several cases from other circuits where courts had reached a similar conclusion.[38] Concluding that the District Court had erred in accepting "touching" as a factual basis for "possession," and that the error was obvious based on the plain reading of the statute, Haynes moved on to the two remaining prongs of plain error review.[39] He found that the error had affected Smith's substantial rights because Smith would not have pleaded guilty had he known that mere touching was insufficient for possession.[40] The error also had a "serious effect on the fairness and integrity of the proceedings" because Smith "[was] or could be innocent" of the charge to which he pleaded guilty.[41] Thus the Court had the discretion to correct the error.[42] Although post-conviction relief—such as an ineffective assistance of counsel claim—might have been an alternative remedy, Haynes concluded it was imperative to safeguard the "fairness and integrity" of the court by providing Smith with immediate relief; he vacated the guilty plea, conviction, and sentence.[43]

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[36] *Id.* at 222 (quoting United States v. Hagman, 740 F.3d 1044, 1048 (5th Cir. 2014)).

[37] *Id.* at 223 (citing *Hagman*, 740 F.3d at 1048–49; United States v. Huntsberry, 956 F.3d 270, 279–80 (5th Cir. 2020); and then citing United States v. De Leon, 170 F.3d 494, 498 (5th Cir. 1999)).

[38] *Id.* at 224 (citing United States v. Teemer, 394 F.3d 59, 65 (1st Cir. 2005), and then citing United States v. Beverly, 720 F.2d 34, 37 (6th Cir. 1984) (per curiam) and United States v. Wilson 922 F.2d 1336, 1339 (7th Cir. 1991)).

[39] *Id.*

[40] *Id.* at 224 – 25.

[41] *Id.* at 225.

[42] *Id.* at 219.

[43] *Id.* at 225.

In a dissenting opinion, Judge Smith argued that the majority had misused plain error review to "manufacture[]" a novel concept of actual possession that lower courts will struggle to apply in future cases.[44] First, Smith objected to the majority's precedential analysis, arguing that they imported the concept of "control" from constructive possession cases and erroneously incorporated it into the definition of *actual* possession. He pointed out that most of the cases the majority relied upon—including the out-of-circuit cases—dealt with constructive, not actual, possession.[45] Under the appropriate precedent, he argued, "mere touching" was clearly sufficient to establish actual possession. Specifically, he relied upon the principle that a defendant's fingerprint can prove actual possession.[46] Since a fingerprint proves only that the defendant touched the object, Smith reasoned, touching must constitute possession.[47] He argued this interpretation is equally well-supported by dictionary entries for "possession" and "possess," defined as "[p]hysical occupancy *or* control"[48] and "seize *or* gain control of,"[49] respectively. These definitions seem to imply physical contact of less vigor than the majority's definition would embrace.[50]

Finally, he argued that the majority opinion threatened to confuse the law in three ways. First, by defining "mere touching" out of actual possession, the majority created an overlap between the prima facie elements of possession and the affirmative defense of "brief and . . .

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[44] *Id.* at 225, 230 (Smith, J., dissenting).

[45] *Id.*

[46] *Id.* at 228 (citing United States v. Hagman, 740 F.3d 1044, 1049 (5th Cir. 2014).

[47] *Id.*

[48] *Possession*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

[49] *Possess*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 1770 (3d ed. 1961) (emphasis added).

[50] *Smith*, 997 F.3d at 229 (Smith, J., dissenting).

justified" possession.[51] Second, the Court stretched the boundaries of plain error review, correcting an "error" that was not obvious under the existing law, and only became obvious once the majority "contrive[d]" a novel definition of possession.[52] Third, the Court opened a "pandora's box" of ambiguity, forcing lower courts to evaluate the degree of control a felon exercised over a firearm to determine if he was "master of" it—a standard that might defy clarification.[53]

The court's preoccupation with defining "possession" misses the point. A jury could conclude that Smith's admission to touching the firearm was enough evidence to reach a guilty verdict under the circumstances, even if the touch was not itself logically equivalent to possession. By nonetheless overturning the conviction on the grounds that Smith "*could* be" innocent, [54] the Court departed from Fifth Circuit precedent and Supreme Court jurisprudence, which generally preserves guilty pleas where possible and places the burden on the defendants to prove prejudice. Here, the Fifth Circuit reverses that burden, implicitly adopting a presumption of prejudice[55] for factual basis appeals. That change provides a significant procedural advantage to defendants—one that may be warranted, given the regularity with which innocent defendants plead guilty to avoid harsh sentences. But by applying the presumption without explicitly stating it, the Fifth Circuit missed the opportunity to clarify the doctrine and reassert Rule 52(b)'s protections.

On plain error review, the defendant bears the burden of demonstrating a reasonable

[51] *Id.* at 229–30.

[52] *Id.* at 230.

[53] *Id.*

[54] *Id.* at 225.

[55] Ferguson, *supra* note 5.

probability of prejudice to their "substantial rights;" in other words, the defendant must show that the error affected the verdict or sentence.[56] Following a guilty plea, the defendant's burden is to show that "but for the error, he would not have entered the plea."[57] A defendant is unlikely to plead guilty on a factual basis that does not constitute a crime—thus a clearly insufficient factual basis affects substantial rights.[58] However, some cases may be less clear. In the precedent-setting case on the subject, *United States v. Dominguez Benitez,*[59] the Supreme Court considered what the defendant "thought he could gain by going to trial."[60] Since conviction would have been likely, the Court concluded it was *not* reasonably probable the error affected the defendant's "assessment of his strategic position."[61]

A survey of Fifth Circuit precedent reveals that a defendant in Smith's circumstances would likely be convicted under 18 U.S.C. §922(g). But contra Judge Smith's dissent, this does not necessarily show that a touch *alone* constitutes possession. Instead, a touch can function as the physical link which, in combination with circumstantial evidence, provides a jury with sufficient basis to *infer* possession. For instance, in *United States v. Tyler*,[62] the defendant contested that the presence of his fingerprints on a fraudulent check did not prove possession because he had only momentarily held the check after a friend handed it to him; even though two witnesses supported this story, the Court held that the jury was "free to disbelieve the testimony"

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[56] *Id.* at 320.

[57] Schmidt, *supra* note 4.

[58] *Id.*

[59] 542 U.S. 74 (2004).

[60] *Id.* at 85.

[61] *Id.*

[62] 474 F.2d 1079 (5th Cir. 1973).

and infer possession from the fingerprint and circumstantial evidence.[63] And generally, the court has found that fingerprint evidence can establish actual possession,[64] even though (as Judge Smith rightly points out) a fingerprint *positively* proves nothing more than a touch.[65] The reason is that a physical connection to the object, when combined with circumstantial evidence that shows some degree of control, is strongly suggestive of possession.[66]

Therefore, even accepting the majority's conclusion that a "mere touch" is insufficient for possession, Defendant Smith did not carry his burden to show a reasonable probability of prejudice. Had he gone to trial, a jury could have concluded that, as in *Tyler*, he admitted to touching the .38 revolver to explain away fingerprint evidence he (mistakenly, in this case) believed officers possessed.[67] Faced with a likely conviction on circumstantial evidence, he may well have pleaded guilty to one or both charges even though the elements of actual possession of the .38 were not clearly established. This is especially true given that the other charge—for possession of two stolen weapons—was likely more serious and more strongly supported by the record.[68]

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[63] *Id.* at 1081; *see also* United States v. Meza, 701 F.3d 411, 423 (5th Cir. 2012) ("the jury could infer" possession despite alternative explanations of circumstantial evidence); United States v. De Leon, 170 F.3d 494, 497 (5th Cir. 1999) ("thumbprint on the box of ammunition would also lead a jury to reasonably infer" possession).

[64] United States v. Hagman, 740 F.3d 1044, 1049 (5th Cir. 2014).

[65] *Smith,* 997 F.3d at 228 (Smith, J., dissenting).

[66] *See De Leon*, 170 F.3d at 497 ("the sum of the evidence may be greater than the individual factors. . . . [a] jury could have reasonably inferred . . . possession").

[67] He did, after all, specifically claim that he "touched" it, and then repeat that claim when asked "why his fingerprints would be on [the firearms]." *Smith*, 997 F.3d at 220 n.6. The majority rejects the idea that "an interrogation tactic to get Smith to confess" could count as evidence, *id.*, but a jury hearing the detective's testimony might well disagree.

[68] Smith was found fleeing the scene of the crime with tools and injuries consistent with breaking into the vehicle where the firearms had been moved; while moving the firearms, he would have

Finding nonetheless that the district court's error affected Smith's substantial rights, the Fifth Circuit introduced an implicit presumption of prejudice and muddled the nature of the Defendant's burden on plain error review. Rather than interrogating the record to evaluate reasonable probability, the majority relied entirely on Smith's statements that the error "led him to plead guilty."[69] Crucially, the majority also misconstrued the holding of *United States v. Olano*.[70] In that case, the Supreme Court held that an error seriously affects the fairness and integrity of proceedings if it led to the conviction of an "actually innocent defendant."[71] But in *Smith,* the Fifth Circuit modified the rule: that fairness and integrity are affected wherever a defendant "is *or could be* innocent."[72] The addition of "or could be" to *Olano*'s relatively stringent four-prong test further obviates the reasonable probability standard. A defendant need only claim that he would not have plead guilty but for the error, and then demonstrate that the factual basis leaves a *possibility* of innocence—following *Smith*, the Court would be obliged to vacate any such plea. To say the least, this is a significant departure from *Huntsberry v. United States*,[73] in which the Fifth Circuit affirmed a defendant's conviction even though "the possibility [was] quite real" the defendant could negate one of the elements of the crime to which he had plead *nolo contendere*.[74]

These modifications of the doctrine threaten to undercut two recognized purposes of plea

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been in direct physical control. *See* Factual Basis, United States v. Smith, No. 7:19-cr-00168-DC (W.D. Tex. Nov. 22, 2019).

[69] *Smith*, 997 F.3d at 225.

[70] 507 U.S. 725, 736 (1993).

[71] *Id.*

[72] *Smith,* 997 F.3d at 225 (emphasis added).

[73] 956 F.3d 270 (5th Cir. 2020).

[74] *Id.* at 286–87.

bargaining: first, to provide "a defendant who sees slight possibility of acquittal . . . the advantages of pleading guilty and limiting the probable penalty," and second, to conserve the "scarce judicial and prosecutorial resources" of the State.[75] Inherent in these policy goals is a trade-off between institutional efficiency and the near-certain consequence that at least some individuals will plead guilty to crimes they did not commit.[76] Construed broadly, *Smith*'s holding could enable reversal of nearly any guilty plea, since even the most thorough factual basis *could be* signed by an actually innocent defendant.

Such a broad application could produce counterintuitive results, potentially undermining the utility and integrity of plea bargaining. First, it is possible that a defendant in Smith's position—having plead guilty to a lesser, unsupported charge to avoid conviction on a more serious count—could be trapped into entering a less favorable plea after remand. Alternatively, the government could drop the charges altogether. That possibility may create a perverse incentive for similarly situated defendants to engage in the plea-bargain equivalent of "sandbagging"[77]—agreeing to plead guilty to a charge with a defective factual basis in exchange for immunity from another, more certain charge, then trying to upset the conviction on appeal.

To overturn Smith's conviction without muddling the doctrine, the majority should have explicitly held that a presumption of prejudice applies to guilty pleas based upon a deficient factual basis. The presumption of prejudice lifts the defendant-appellant's burden on plain error review and instead requires the government to show that an error was not prejudicial.[78] Appellate

[75] Brady v. United States, 397 U.S. 742, 752 (1970).

[76] *See* Schmidt, *supra* note 1, at 296.

[77] The practice of "sandbagging" is "purposely forfeiting an objection in order to preserve a basis for appeal if the result of the trial court proceeding is unsatisfactory. Ferguson, *supra* note 5, at 304.

[78] *Id.* at 303.

courts typically invoke the presumption when it would be particularly difficult for a defendant to prove prejudice by pointing to specific facts in the record, such as erroneous applications of Federal Sentencing Guidelines.[79] While courts often apply the presumption of prejudice implicitly, lifting the defendant's burden selectively can create doctrinal inconsistency.[80] Explicitly identifying the presumption of prejudice gives courts the opportunity to control the circumstances when it applies and to preserve doctrinal coherence.[81]

A presumption of prejudice for guilty pleas with deficient factual bases would have several advantages. By subjecting factual basis documents to a more exacting review, the narrow presumption could revive one of the original aims of Rule 11—protecting defendants' interests in a criminal justice system increasingly dominated by plea bargains.[82] Knowing that a plea deal will not survive review without a clear element-by-element admission of guilt, prosecutors would be incentivized to examine factual bases more thoroughly and make sure defendants fully understand the charges against them. Similarly, lower court judges—who often pay very little attention to the factual basis requirement[83]—would more closely scrutinize the substance of guilty pleas before convicting. Rather than straining government resources, this change could

[79] *Id.* at 320.

[80] The Fifth Circuit itself has presumed prejudice in certain cases, *e.g.*, United States v. Perez, 460 F. App'x 294 (5th Cir. 2021), while refusing to do so in others, *e.g.*, United States v. Blocker, 612 F.3d 413 (5th Cir. 2010), but has never announced a rationale for when the presumption should apply. Ferguson, *supra* note 5, at 317-18.

[81] *Id.* at 321. For example, courts could decide whether to lift the burden based on a five-factor test: (1) the probability that prejudice has occurred, (2) whether the error below is of the type that defies typical analysis because there is likely nothing in the record the defendant could use to demonstrate prejudice, (3) the risk that sandbagging has occurred, (4) the judicial burden remanding would cause, (5) whether proceedings on remand would be jeopardized because of delay. *Id.* at 305, 323.

[82] Schmidt, *supra* note 1, at 288.

[83] *Id.* at 307.

increase trust in the judiciary and "induce some defendants to choose a bench trial" over a more costly trial-by-jury.[84] Lastly, a presumption of prejudice for factual basis review may better serve the purposes of Rule 52(b), because there is a high probability of prejudice for guilty pleas,[85] and whether a defendant would not have plead guilty but for a deficient factual basis may be difficult to prove by pointing to specific facts in the record.[86]

Given the potential significance of its decision, the Fifth Circuit should have explicitly held that where a factual basis fails to include explicit admissions to each element of a crime, the defendant's burden to demonstrate prejudice will be lifted. Applying that rule, the Court could have overturned Smith's conviction, since the government's only means of rebutting the presumption was a deficient factual basis. Instead, the Fifth Circuit left lower courts with no way of knowing when defendants are situated similarly enough to Smith that the decision's closer scrutiny should apply. Lower courts will likely treat *Smith* as a one-off and continue to accept guilty pleas with thin factual bases, and the Fifth Circuit will have no clear rule for where to place the burden upon review. The *Smith* majority missed the opportunity to name the presumption of prejudice explicitly and clarify when it should apply.

[84] Kim, *supra* note 59, at 139–40.

[85] The vast majority of convictions result from guilty pleas, and many of those who plead guilty are innocent. *The Troubling Spread of Plea-Bargaining from America to the World*, THE ECONOMIST at 1, 3 (Nov. 9, 2017).

[86] Ferguson, *supra* note 5, at 323.

Applicant Details

First Name	**Jake**
Last Name	**Heller**
Citizenship Status	**Lawful permanent residents who are seeking citizenship as outlined in 8 U.S.C. Â§ 1324b(a)(3)(B)**
Email Address	**jake.heller@live.law.cuny.edu**
Address	**Address** **Street** **184 DeKalb Avenue, Apt. 2** **City** **Brooklyn** **State/Territory** **New York** **Zip** **11205** **Country** **United States**
Contact Phone Number	**646-522-3297**

Applicant Education

BA/BS From	**McGill University, Canada**
Date of BA/BS	**May 2010**
JD/LLB From	**City University of New York School of Law** **http://www.law.cuny.edu**
Date of JD/LLB	**May 10, 2024**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**CUNY Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**CUNY Law Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

DeCell, Carrie
carrie.decell@knightcolumbia.org
Rosenberg, Joseph
rosenberg@law.cuny.edu
718-340-4375
Deale, Frank
deale@law.cuny.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

Thank you very much for considering my application to join your chambers as a clerk for the 2024-25 term. I am a rising third-year student at CUNY School of Law, where I am the Managing Digital Editor of the CUNY Law Review. Prior to law school, I worked as a journalist for NBC News, The Daily Beast, and as the founding editor of a magazine dedicated to exposing abuses of power in underrepresented communities across the country. I greatly appreciate your time and consideration.

As an aspiring civil rights attorney, I would particularly welcome the opportunity to work with and learn from you. At the ACLU Voting Rights Project, Knight First Amendment Institute at Columbia University, and now at the ACLU National Security Project, I have contributed to high-level impact litigation cases and have honed the skills that will make me an effective advocate and judicial clerk. My journalism experience, meanwhile, not only sharpened my writing, research, and analytical abilities, but allowed me to witness firsthand—and now bring to my legal analysis—the impact that the law has on people.

Please find my resume, law school transcript, undergraduate transcript, and writing sample enclosed. Letters of recommendation from Professor Frank Deale (Civil Procedure; Voting Rights), Professor Joe Rosenberg (Lawyering Seminar), and Carrie DeCell (my internship supervisor at the Knight First Amendment Institute) will follow.

Additionally, Professor John Whitlow (Property), Professor Sarah Lamdan (Administrative Law; Data Privacy Seminar) and Ming Cheung (my internship supervisor at the ACLU Voting Rights Project) are available as further references. Their contact information is listed below.

I can be reached by phone at 646.522.3297 or by email at jake.heller@live.law.cuny.edu. I would of course be happy to answer any questions you may have and/or provide you with additional materials. Thank you very much once again for considering my application.

Sincerely,
Jake Heller

Ming Cheung
Staff Attorney, ACLU Voting Rights Project
mcheung@aclu.org
646.610.9943

Professor Sarah Lamdan
Professor, CUNY School of Law
sarah.lamdan@law.cuny.edu
718.340.4563

Professor John Whitlow
Professor, CUNY School of Law
john.whitlow@law.cuny.edu
646.321.9308

Jake G. Heller

646.522.3297 | jake.heller@live.law.cuny.edu

Education

City University of New York (CUNY) School of Law, New York, N.Y.
Juris Doctor (J.D.) candidate, G.P.A.: 3.99 2021 to 2024 (expected)

- Journal: *CUNY Law Review* Managing Board Member and Managing Digital Editor; former Staff Editor
- Activities: Moot Court: Member and Summer Competition Committee, Bluebook Co-Chair; TA: Criminal Law (Prof. Babe Howell); CUNY National Lawyers Guild (NLG) Executive Board Member
- Scholarship: *Policing Permanent Suspects: DNA Databases and the Promise of Data Abolition*
- Fellow, Harvard Law School Justice Initiative September 2022 to Present
- Selected Invitee, Law & Political Economy Project (LPE) Law and Organizing Academy May 2023

Columbia University Graduate School of Journalism, New York, N.Y.
Master of Science (M.S.), Thesis on economic inequality in America May 2012

- Elected class president and student commencement speaker.

McGill University, Montreal, Canada
Bachelor of Arts (B.A.), Major: History, Minors: Political Science, Economics May 2010

Experience

ACLU National Security Project, Legal Intern, New York, N.Y. June to August 2023

- Contributing legal research and writing to active and developing national security litigation.

ACLU Voting Rights Project, Legal Intern, New York, N.Y January to April 2023

- Contributed legal research and writing to ongoing voting rights litigation across the country.
- Wrote legal memoranda, cite-checked a Supreme Court brief, and helped prepare for an oral argument. Cases included voter criminalization in Texas, Georgia's line relief ban, racial gerrymandering, and redistricting.

Mississippi Workers' Center for Human Rights, Legal Intern, Greenville, Miss. January 2023

- Selected for a delegation that traveled to Mississippi to work on and learn about civil and human rights law.
- Contributed legal research and writing to the lawsuit seeking justice for Emmett Till and his family.
- Drafted a proposed Mississippi Workers' Bill of Rights; advocated in person with state legislators for legislative proposals advancing racial justice and workers' rights.

Knight First Amendment Institute at Columbia University, Legal Intern, New York, N.Y. June to August 2022

- Contributed legal research and writing to active and developing litigation about surveillance, government transparency, public access to criminal pretrial proceedings, and the First Amendment post-*Dobbs*.
- Wrote legal and factual memoranda, drafted a FOIA request, contributed research to a white paper, participated in partner meetings, and helped develop new avenues for future litigation.

Enemy Magazine, Founder and Editor-in-Chief, New York, N.Y. October 2019 to Present

- Founded a magazine and newsletter dedicated to exposing abuses of power in underrepresented communities.

Poor People's Campaign, New York State March 2020 to Present

- As part of a committee, led communications for the campaign in New York State. Current member.
- Hosted a public access television program connecting advocates and activists across the country.

NBC News, Social Justice Reporter and Producer, New York, N.Y. April 2014 to October 2019

- Reported, wrote, and produced longform stories and documentaries about social justice issues.
- Covered, among other topics, pretrial solitary confinement, abuse in ICE detention centers, the criminalization of homelessness, voting rights, workers' rights, surveillance, and the climate crisis.

Transcript

Cumulative G.P.A.: 3.99

LAW 7151	Property: Law & Market Eco III	2023 Spring Term	A	4.00
LAW 7251	Public Institutions/Admin Law	2023 Spring Term	A	3.00
LAW 7726	Topics In Law (Poverty/Social Change Seminar)	2023 Spring Term	A	2.00
LAW 804	Law Review Editing	2023 Spring Term	CR	1.00
LAW 825	Lawyering Seminar III (DATA PRIVACY SEMINAR)	2023 Spring Term	A	4.00
LAW 843	Missisippi Project	2023 Spring Term	A	1.00
LAW 7192	Constitutional Structures	2022 Fall Term	A	3.00
LAW 7292	Evidence-L&Pub Int 1	2022 Fall Term	A	4.00
LAW 739	Voting Rights	2022 Fall Term	A	3.00
LAW 7723	Teaching Assistant	2022 Fall Term	A	2.00
LAW 7726	Topics In Law (Critical Race Theory)	2022 Fall Term	A	2.00
LAW 7726	Topics In Law (Law&the Aboltn of Modern Day)	2022 Fall Term	A	3.00
LAW 7005	Lawyering Seminar II	2022 Spring Term	A	4.00
LAW 702	Contracts: LME II	2022 Spring Term	A	3.00
LAW 709	Civil Procedure	2022 Spring Term	A	3.00
LAW 7141	Torts-Rsp Inj Conduc	2022 Spring Term	A	3.00
LAW 7161	Law and Family Relations	2022 Spring Term	A-	2.00
LAW 7004	Lawyering Seminar I	2021 Fall Term	A	4.00
LAW 701	Contract Law Market Economy I	2021 Fall Term	A	3.00
LAW 7043	Liberty Equality & Due Process	2021 Fall Term	A	3.00
LAW 705	Legal Research	2021 Fall Term	A	2.00
LAW 7131	Crim L-Rsp Inj Condu	2021 Fall Term	A	3.00

June 13, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write to recommend Jake Heller for a clerkship in your chambers.

My name is Carrie DeCell, and I am a senior staff attorney at the Knight First Amendment Institute at Columbia University. I graduated from Harvard Law School in 2011, clerked for Judge Judith W. Rogers on the D.C. Circuit Court of Appeals from 2011–2012, and then worked as an associate in Jenner & Block's Appellate & Supreme Court Practice group before joining the Knight Institute in July 2017. I also supervised the Knight Institute's externship program from the fall of 2018 through the spring of 2023.

Jake first impressed me with his initiative. He reached out to me in the spring of 2021 as he was waiting to receive law school acceptance letters. Having already graduated from Columbia Journalism School and pursued a successful career as a journalist, Jake applied to law school with specific goals in mind. He was keenly interested in litigating issues cropping up at the intersection of First Amendment law and new technologies—the focus of the Knight Institute's work—so he wanted to establish a relationship with the Institute as soon as possible. Shortly after starting law school, he applied for the Institute's summer legal internship, and we eagerly accepted him.

Jake's prior career as a journalist no doubt contributed to his success over the summer. Jake took on a handful of different assignments for different supervisors, and by all accounts, his research was thorough, his writing was clear, and his conclusions were well-founded. I worked with Jake most closely on a set of research assignments for a case addressing spyware attacks against journalists working in Central America. As the case was still in development at that time, Jake's assignments spanned a broad range of questions. He drafted a Freedom of Information Act request seeking records relating to the addition of the spyware manufacturer to the U.S. Entity List; he examined the spyware manufacturer's corporate structure and the possibility of establishing general personal jurisdiction in the United States; and he analyzed a petition for certiorari filed by the spyware manufacturer in a related case, correctly concluding that the Supreme Court was likely to deny the petition. He asked appropriate questions shortly after receiving each assignment and then set himself to task, seeking further guidance only as needed before turning the assignment in. Ultimately, he produced clear, comprehensive, and well-organized legal memoranda that consistently conveyed exactly the information we needed.

In addition to producing top-notch work, Jake was a terrific colleague. He participated in countless team meetings throughout the summer, at which he listened patiently before contributing carefully considered comments. He was generous with his time and concern for other interns and staff members. And, not to be discounted, he was genuinely friendly and funny. The entire Knight Institute Staff thoroughly enjoyed his company.

* * *

In short, Jake is a talented former journalist and a thoughtful lawyer-to-be. I am confident that he will be a hard-working, helpful law clerk and a collegial co-clerk. I know he is particularly focused on clerking in the New York and D.C. areas, so please let me know if I can provide any additional information that would help you in assessing his application. You can reach me at carrie.decell@knightcolumbia.org or (202) 903-3875.

Sincerely,

Carrie DeCell
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500 (office)
(202) 903-3875 (cell)
carrie.decell@knightcolumbia.org

June 7, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Re: Recommendation of Jake Heller

Dear Judge Robinson:

I am writing to recommend Jake Heller for a federal judicial clerkship. Jake was a student in my first year Lawyering Seminar at CUNY School of Law in the Spring of 2022. I recommend Jake enthusiastically and without reservation.

CUNY School of Law's motto is "Law in the Service of Human Needs." Our mission embodies two main objectives: access to the legal profession and social justice. Our curriculum is focused on public-interest lawyering and experiential learning. We encourage students to develop a critical perspective on law and use their lawyering tools to promote equality and due process, particularly for those who are oppressed, vulnerable, and marginalized.

The first semester lawyering seminar curriculum introduces students to a variety of lawyering skills within the context of a simulated case. Jake's lawyering seminar worked on a case involving allegations of false arrest, police brutality, racism, and the legal issue of qualified immunity. The simulation required students to conduct legal research, negotiate, draft a partial and full brief, and participate in an oral argument.

Jake came to law school with substantial and impressive experience in journalism, including significant writing experience. Jake was able to adapt and transfer his writing skills to a new genre of writing, which can be challenging for students who have been successful writers in a different profession. Jake embraced the challenges of learning lawyering skills in an advocacy setting with humility, a strong work ethic, and a burning desire to learn.

Jake is self-motivated, self-critical, and responsive to feedback. Throughout the semester, Jake was consistently thoughtful and engaged in seminar and proved to be a tremendously supportive colleague to other students. Jake embraced the planning, doing, and reflecting framework that is a foundational aspect of our lawyering program.

Jake has excellent interpersonal and professional communication skills—in seminar and in our various lawyering activities, he demonstrated self-awareness and an understanding of how to balance listening and verbal participation. In seminar, Jake demonstrated the ability to cogently explain legal concepts, apply them to the facts of our simulated case, and critically explore the strengths and weakness of various legal positions and strategies. Jake was thoughtful and practical about the race and power dimensions implicated by the qualified immunity doctrine; his mature critical perspective helped elevate our group discussions.

In the negotiation part of our simulation, Jake understood the impact of one's role in the litigation and, with his partner, developed an effective strategy that combined a constructive and empathetic approach with an advocacy "edge." Jake's professionalism helped make the negotiation a realistic and positive learning experience for both sides at the table.

Jake's legal research and writing skills are exemplary. In his brief, Jake's excellent preliminary statement framed his theory of the case persuasively and reinforced the applicable rules and principles that reflected his advocacy position. Jake's statement of facts had an effective narrative structure that took the reader through the key events of the case. He effectively emphasized favorable facts while deftly minimizing adverse facts, which created the context for his legal analysis.

Jake structured his legal analysis clearly and concisely, with excellent framing of the relevant legal rules and discussion of cases. He persuasively compared and contrasted the facts of our simulation with the relevant cases, drawing on a variety of rhetorical techniques that we read about and discussed in class. Jake's legal writing demonstrated a strong understanding of how to structure an advocacy brief and reflected meticulous attention to editing, revising, proofreading, and proper citation form.

Jake has strong communication and oral advocacy skills. During his oral argument, his preparation was evident: he presented his case confidently, responded effectively to challenging questions from the judge, was able to return to the main points of his argument, managed his time effectively, and made effective use of his rebuttal. Jake's reflections on the oral argument were thoughtful, self-critical, and insightful.

In our supervision meetings over the course of the semester, Jake was prepared and responsive to feedback, which he worked diligently to incorporate.

Jake's work ethic, interpersonal skills, knack for collaboration, and excellent research, analytical, and writing skills make him a superlative candidate for a judicial clerkship.

Please let me know if I can provide any additional information.

Very truly yours,

Joseph A. Rosenberg

Joseph Rosenberg - rosenberg@law.cuny.edu - 718-340-4375

Joseph Rosenberg - rosenberg@law.cuny.edu - 718-340-4375

June 8, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:-

It gives me great pleasure to write this letter supporting the application of Jake Heller for a federal clerkship in your Chamber. Mr. Heller is one of the most outstanding students I have had in my 30 years of law school teaching, mostly at CUNY Law School, but also at Rutgers Law School in Newark. I have come to know Mr. Heller well in the two years that he has been a student at CUNY Law School. He took a fairly small Voting Rights class that I taught in the fall of 2022, but I first came to know him in my larger first year Civil Procedure class in the spring of 2021.

Mr. Heller stood out in both classes because of his intense engagement with the material, where he used the opportunity to show the depth of his preparation and understanding as well as his highly inquisitive personna. Moreover, in each class he prepared two excellent highly sophisticated written memoranda which highlighted his analytical abilities, command of the doctrine, and ability to communicate his thoughts in written form.

As the law school is relatively small in size, I have had the opportunity to discuss with Mr. Heller his career goals, outlook on the law, and work experiences notwithstanding the distancing over the years necessitated by the pandemic. In those discussions I learned of his community service activity during her first year in law school, working with our Mississippi Project, where students work with southern civil rights attorneys to help provide representation for those in that state who would otherwise go unrepresented.

Along with his outstanding law school performance, Mr. Heller is devoted to fairness and the rule of law, serves on the editorial board of the law school law review, and has held a number of summer jobs and internships, where he has worked closely with some of the most outstanding attorneys doing public service work. My strong belief is that these qualifications make him an exceptional candidate for a clerkship in your Chamber.

I hope this letter is helpful to you in your selection process. Should you need to speak to me about Mr. Heller I can be reached at 646 515 4005.

Sincerely,

Frank Deale
Professor of Law
CUNY Law School

Writing Sample

The following is a brief I wrote for my Lawyering Seminar. I was assigned to represent the City of New York in a hypothetical § 1983 case, which turned on the issue of qualified immunity. This brief was lightly edited by my professor.

Preliminary Statement

Police officers protect the public's safety while risking their own, often in dangerous and unpredictable circumstances. Entrusted with this critical societal duty, officers must be free to exercise their expert discretion while on patrol. Courts have long agreed. *See Pierson v. Ray*, 386 U.S. 547 (1967). Courts have thus resolutely upheld the defense of qualified immunity, which insulates police officers not only from liability but from litigation, to ensure that officers are not caught in the quandary set out by the Supreme Court decades ago: "A policeman's lot is not so unhappy," the Court wrote, "that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Id.* at 555.

Recognizing the importance of police decision-making discretion, the Supreme Court and the Second Circuit Court of Appeals continue to consistently reaffirm the "broad shield" of qualified immunity, *Zalaski v. City of Hartford*, 723 F.3d 382, 389 (2d Cir. 2013), which protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The police officers in this case were not plainly incompetent. Nor did they knowingly violate the law. They responded to a 9-1-1 call to investigate a fight and then arrested the Plaintiff after his explosive outbursts made an officer fear for her safety and attracted a crowd. In arresting the Plaintiff for disorderly conduct, in fact, Officer Wasserman acted both with probable cause and arguable probable cause to protect the safety of his colleagues, the safety of the residents who called the police to summon him to the scene, and his own safety. Based on the facts known to him at the time, he reasonably believed that the Plaintiff met the criteria for disorderly conduct and acted accordingly. At the very least, he acted in a manner that reasonable officers could disagree was necessary, given the Plaintiff's public spectacle.

The City of New York therefore respectfully asks this court to continue to protect "the values qualified immunity seeks to promote" to ensure that police officers can continue to protect

the public. *Ashcroft v. al–Kidd*, 563 U.S. 731, 735 (2011). We request that this court grant the motion to dismiss on the grounds of qualified immunity.

Statement of Facts

On or about August 23, 2021, around 6:00 pm, residents near 151-2 85th Street in Queens, New York called 9-1-1 to report a fight. Complaint ¶19 [hereinafter "Compl."].

The NYPD responded to the call. Eight officers, including the Defendants Police Officer Kathryn Madison (Shield #13605), Police Officer Peter Wasserman (Shield #8807), and Police Officers John Doe #1-3, arrived on the scene. Compl. ¶19.

Upon arrival, police saw Plaintiff Raequan Johnson and his neighbor standing near the location of the reported fight, in front of or around 151-2 85th Street. Both men had helped break up the fight. Compl. ¶18. Officer Madison approached the witnesses to begin her investigation. Compl. ¶19.

Officer Madison stopped about ten feet away from the witnesses and asked for their identification. Exhibit A ¶14-15 [hereinafter "Ex. A"]. Plaintiff refused to share his identification. Compl. ¶20.

Officer Madison asked to see the witnesses' identification three more times. Plaintiff refused all three times. Ex. A ¶16.

Plaintiff then began to yell at Officer Madison. He shouted profanities and insults at her, including calling her a racist. Ex. A ¶16. By Plaintiff's own account, he "exploded" at her. Ex. A ¶18.

Plaintiff was so irate, "emotional and angry" that his neighbor physically grabbed him on his shoulder to calm him down. Ex. A. ¶18. Plaintiff alleges that Officer Madison made racially insensitive comments and referenced Plaintiff's deceased brother, whom Officer Madison knew. Plaintiff stopped screaming, but continued to curse. Compl. ¶21.

Hearing the outburst directed from Plaintiff towards Officer Madison, Officer Wasserman and Officers John Doe #1-3 hurried over and asked what was happening. Officer Madison told her male colleagues that Plaintiff had threatened her and had made her fear for her safety. Compl. ¶22.

Plaintiff's outburst drew the attention of many neighbors and additional police officers,

who gathered around "because of the noise." Ex. A ¶19.

As Plaintiff continued to scream at Officer Madison, one neighbor began to film the outburst. Ex. A ¶19. Officer John Doe #1 told Plaintiff to calm down. Plaintiff did not calm down; instead, he continued to yell back at the officers. Despite this, Plaintiff contends that he never threatened Officer Madison. He continued to yell. Compl. ¶22.

Officer Wasserman then approached Plaintiff and asked him to put his hands behind his back. Plaintiff refused. Compl. ¶24. Officer Wasserman again asked Plaintiff to put his hands behind his back. Plaintiff again refused. Compl. ¶24.

Officer Wasserman then announced that Plaintiff was under arrest for disorderly conduct. As Officer Wasserman attempted to execute the arrest, Plaintiff "tried to protest" and Officer Wasserman took hold of Plaintiff's left arm. Ex. A ¶21. Officers #1-3 ran up to assist Officer Wasserman, and the four officers wrestled Plaintiff to the ground. Compl. ¶24. In the struggle, Plaintiff tore his left rotator cuff. Plaintiff alleges that Officer Wasserman pulled on his arm during the melee and caused the injury. Plaintiff was handcuffed and placed into a police car. Compl. ¶25.

As he was being transported to the 103rd precinct, Plaintiff also alleges that Officer Wasserman pressed on his shoulder and called him a "wuss." Ex. A ¶ 23. Plaintiff and the officers then arrived at the 103rd precinct. Compl. ¶31.

Plaintiff requested to be taken to the hospital. Police officers called an Emergency Medical Technician (EMT) to examine Plaintiff. The EMT recommended that Plaintiff be taken to the hospital, so Officer Wasserman and another officer personally brought Plaintiff from the precinct to Jamaica Hospital Medical Center. Ex. A ¶25.

Dr. Barbara Alleyne examined Plaintiff at the hospital and recommended that he be admitted for surgery on his shoulder. This procedure, she said, would require one week in the hospital. As Plaintiff was still in custody and remained handcuffed to his hospital bed, Officer Wasserman, who was overseeing Plaintiff's hospital visit, responded that Plaintiff could stay in the hospital for one day and would be taken back to the precinct by the next day. Compl. ¶33.

Late the next day, at approximately 9:30 p.m., Plaintiff was taken back to the precinct in a sling, where he was processed and held on six distinct charges. Compl. ¶34. Plaintiff was transferred to Central Booking and, early the next morning, was arraigned on charges of Assault

in the Third Degree, Resisting Arrest, and Disorderly Conduct. Compl. ¶36.

Plaintiff was released on his own recognizance. Compl. ¶36.

On September 8, 2021, Plaintiff had surgery on his left shoulder, which cost $8,324.75. Plaintiff's insurance company refused to pay for the surgery. Compl. ¶37.

On December 14, 2021, Plaintiff was tried for Assault in the Third Degree, Resisting Arrest, and Disorderly Conduct, and was acquitted by a jury. Compl. ¶40.

Argument

1. **The court should grant the motion to dismiss based on qualified immunity because Officer Wasserman had both probable cause and arguable probable cause when he arrested Plaintiff for disorderly conduct.**

Private citizens are entitled to bring civil rights claims against and seek monetary damages from police officers for alleged violations of their constitutional rights. 42 U.S.C. § 1983. The law, however, provides police officers with an important defense to such claims: qualified immunity protects police officers from having to defend against these suits when the officers have acted with "good faith and probable cause." *Pierson v. Ray*, 386 U.S. at 557. Facing unknown dangers and tasked with protecting and serving the public, police officers depend on the qualified immunity defense to be able to exercise discretion, without hesitation, while performing their duties. *See Anderson v. Creighton*, 483 U.S. 635 (1987). A police officer is entitled to qualified immunity when: 1) the officer did not violate a federal law under the U.S. Constitution or under a federal statute (i.e., the officer had probable cause); and/or 2) the law in question was not "clearly established" at the time of the officer's actions (i.e., the officer had arguable probable cause). *Zalaski v. City of Hartford*, 723 F.3d 382.

The Supreme Court crafted the qualified immunity defense specifically to give federal district court judges the opportunity to rule on it as early in a case as possible, granting public officials not simply immunity from damages but "immunity from suit." Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 17 TOURO L. REV. 525 (2016). The Supreme Court's intention to protect police officers from burdensome trials has been repeatedly made clear; qualified immunity defenses are therefore commonly raised in § 1983 cases at the motion to dismiss stage. *See, e.g.*, *Saucier v. Katz*, 533 U.S. 194 (2001); *Garcia v. Does*, 779 F.3d 84 (2d Cir.

2015).

Qualified immunity is an affirmative defense, meaning the defendant must prove to the court that the defense applies and that their motion to dismiss should be granted. At the motion to dismiss stage, the court must view all of the facts alleged in the complaint favorably for the plaintiff and must make all inferences in the plaintiff's favor. *McKenna v. Wright*, 386 F.3d 432 (2d Cir. 2004). But the facts alleged here fail to meet the bar set for the plaintiff at the motion to dismiss stage: The plaintiff's claim can also only survive a motion to dismiss when it is "facially plausible"—that is, when the plaintiff's complaint shows "more than a sheer possibility that a defendant has acted unlawfully." *Grytsyk v. Morales*, 527 F. Supp. 3d 639, 646 (S.D.N.Y. 2021). As the Supreme Court explained, if the plaintiff's proceedings "have not nudged [his or her] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Under this standard, the court should grant the motion to dismiss based on qualified immunity. The City will show that Officer Wasserman did not violate federal law when he arrested Plaintiff for disorderly conduct (i.e., that he had probable cause) and that the law was not "clearly established" when he did so (i.e., that he also possessed arguable probable cause).

1.1 The court should grant the motion to dismiss because Officer Wasserman had probable cause to arrest Plaintiff for disorderly conduct.

A false arrest claim in New York is "substantially the same" as a Fourth Amendment claim for unreasonable seizures. *Case v. City of New York*, 408 F. Supp. 3d 313, 320 (S.D.N.Y. 2019) (quoting *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996)). A claimant must show "that the defendant intentionally confined him without his consent and without justification." *Id.*

Police officers are justified in making an arrest, however, when they have probable cause. Indeed, probable cause is a complete defense to false arrest—meaning that where there is probable cause, there is no false arrest. *Id.* And where there is no false arrest, there is no violation of federal law.

Probable cause exists when an arresting officer exercising "reasonable caution" has reason to believe that the person they are arresting has committed a crime or is committing a crime. *Id.* Accordingly, "whether probable cause exists depends upon the reasonable conclusion to be drawn

from the facts known to the arresting officer at the time of the arrest." *Zellner v. Summerlin*, 494 F.3d 344, 369 (2d Cir. 2007) (quoting *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004)).

The officer's intent is not germane. The Second Circuit made clear that "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." *Zellner v. Summerlin*, 494 F.3d at 369.

The crime at issue here is disorderly conduct. A person is guilty of disorderly conduct when they meet at least one of the statute's seven subdivisions "with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof." N.Y.P.L. § 240.20. Officer Wasserman had probable cause when he arrested Plaintiff for disorderly conduct because he reasonably concluded from the facts he knew at the time that Plaintiff 1) met that mens rea standard; 2) was in a public place; and 3) used obscene language or made an obscene gesture. N.Y.P.L. § 240.20(3).

Officer Wasserman knew that Plaintiff used obscene language because he witnessed Plaintiff cursing at and disparaging police officers. The complaint—taken as true and seen in the most favorable light for the plaintiff—makes that fact plain. That Plaintiff was in a "public place" is also incontrovertible, as he was on a public street corner. *See Smith v. City of New York*, No. 18-CV-05079, 2021 WL 4267525, at *9 (S.D.N.Y. Sept. 20, 2021). All the City has to show, then, to show probable cause, is that Officer Wasserman had reason to believe that Plaintiff met what is known as the "public harm" element of the statute—that Plaintiff either intended to cause, or recklessly created a risk of, public annoyance, inconvenience, or alarm.

To determine what constitutes "public harm" under N.Y.P.L. § 240.20(3), courts consider four contextual factors: the time and place of the episode in question; the nature and character of the conduct; the number of other people in the vicinity; whether others are drawn to the disturbance and, if so, the nature and number of those attracted. *People v. Baker*, 984 N.E.2d 902 (N.Y. 2013). Courts can also consider "any other relevant circumstances" when evaluating the public harm element. *People v. Weaver*, 944 N.E.2d 634, 636 (N.Y. 2011).

Police officers, of course, cannot contemplate these factors as courts do; they must use their discretion quickly to effectively discharge their public duties. The Second Circuit has therefore also stressed that "because the practical restraints on police in the field are greater with respect to ascertaining intent," courts must grant police officers "correspondingly great" latitude

when evaluating the officers' judgment vis-a-vis probable cause. *Zalaski v. City of Hartford*, 723 F.3d at 393.

New York's disorderly conduct statute was designed to proscribe acts that were decidedly public in nature, as distinguished from 'individual' disputes. *Weyant v. Okst*, 101 F.3d at 855. Thus, every factor described above weighs in favor of disorderly conduct—and thus probable cause—when it advances this public dimension. *See Smith*, 2021 WL 4267525, at *9 (citing *Weyant*, 101 F.3d at 852).

There is public harm when the person accused of disorderly conduct has acted out in the open or in public, disrupting an environment where people normally expect quiet. *People v. Weaver*, 944 N.E.2d 634. In *Smith*, the plaintiff swore and screamed at police officers while outside on a one-way residential street in the Bronx. The *Smith* court reasoned that this setting—a New York City public sidewalk during the day—pointed towards public harm, which ultimately undergirded its decision to grant qualified immunity based on probable cause for disorderly conduct. 2021 WL 4267525, at *9.

The nature and character of an act weighs in favor of public harm when the act is loud, combative, disruptive, aggressive, confrontational, and/or contains profanities. In *Tobias v. Cnty. of Putnam*, the court found that the plaintiff "made a significant spectacle" and "peppered his argument with profanities," leading to public harm. 191 F. Supp. 2d 364, 375 (S.D.N.Y. 2002). In *Stern v. Shammas*, the plaintiff was "highly disruptive, aggressive, and confrontational" and escalated the situation after being asked to calm down, leading to public harm. No. 12-CV-5210, 2015 U.S. Dist. LEXIS 143194, at *4 (E.D.N.Y. Oct. 21, 2015). In *Smith*, meanwhile, the plaintiff was "shouting and cursing loud enough that the officers could hear him from across the street." 2021 WL 4267525, at *10. Smith also rebuffed police officers' requests to see his ID; instead, he responded combatively. This, too, led to public harm. *Id.* at *2. In all of these cases, plaintiffs were confronting police officers who were merely asking questions.

The third factor follows logically. Where there are other people in the vicinity, public harm is more likely. *See Weaver*, 944 N.E.2d 634; *Baker*, 984 N.E.2d 902. More meaningful, though, are the details of the public's interaction with the disturbance: Courts find public harm when the accused draws a crowd, *see Smith*, 2021 WL 4267525, where the accused creates a scene with the potential for bystanders to be drawn in, *see Weaver*, 944 N.E.2d 634, or where

bystanders record the episode on their cell phones. *See People v. Webb*, 135 N.Y.S.3d 572 (N.Y. App. Term 2020).

Moreover, courts have made clear that an altercation moves from the 'individual' to the 'public' realm the moment it attracts the attention of "at least one neighbor." *Smith*, 2021 WL 4267525, at *10; *see also Tobias v. Cnty. of Putnam*, 191 F. Supp. 2d at 374-75. In *Smith*, the plaintiffs disputed the public nature of the altercation by arguing that a "crowd" did not gather as a result of the plaintiff yelling and cursing at police officers. But the court found that the plaintiff's disruption only needed to catch the eyes and ears of one neighbor to be considered public. *Id.*

In the present case, Officer Wasserman had probable cause to arrest Plaintiff for disorderly conduct because the facts and circumstances known to him on that day led him to reasonably believe that the Plaintiff's conduct met all three elements of the crime.

As above, it is undisputed that Plaintiff both used obscene language and was in a public place. These two elements informed Officer Wasserman's reasonable belief that Plaintiff was committing disorderly conduct.

But Officer Wasserman also reasonably believed that Plaintiff at the very least recklessly created a risk of public annoyance, inconvenience, or alarm based on the factors used to assess this element. In other words, Officer Wasserman reasonably concluded that Plaintiff possessed the necessary mens rea to commit disorderly conduct, particularly when viewed with the "great latitude" required of courts in these scenarios.

Officer Wasserman reasonably believed that the time and place of Plaintiff's outburst weighed in favor of public harm—and therefore probable cause—because Plaintiff's outburst not only took place during the day on a public New York City sidewalk, as in *Smith* and *Stern*, but Plaintiff erupted in an environment where residents expected calm and quiet, as in *Tobias* and *Weaver*. Indeed, just moments before Plaintiff caused a scene, neighbors had called the police to respond to a fight that had disturbed the very peace and quiet they reasonably expected in their neighborhood.

Plaintiff's outburst was also so disruptive, loud, combative, and full of profanities that Officer Wasserman reasonably believed its nature and character pointed towards public harm. As in *Smith*, Plaintiff refused to show his ID and instead chose to respond to a police officer's

inquiry with loud and combative behavior. Plaintiff swore and yelled at police officers who had calmly approached him, as in *Smith*, *Stern*, and *Tobias*. And, just like in *Stern*, he escalated the situation after being asked numerous times to calm down and after being given many opportunities to comply with simple requests from officers of the law. Worse, here, Plaintiff needed to be physically restrained by a neighbor in order to calm down—nevertheless, he persisted. Put kindly, Plaintiff's outburst fits the description offered by the *Tobias* court: he "made a significant spectacle." 191 F. Supp. 2d at 375.

That "spectacle" drew the attention of a sizable crowd, triggering the third and fourth factors of the public harm element. Officer Wasserman reasonably believed that these factors, too, contributed to Plaintiff's disorderly conduct. Not only did Plaintiff's self-described "explosion" create the conditions for bystanders to be drawn in, as was the case in *Weaver*—he actually did draw in a significant crowd of both neighbors and additional police officers, as occurred in *Smith*. What's more, as in *Webb*, at least one of these additional onlookers started to film the incident, further heightening its public dimension.

Plaintiff's outburst far surpassed the baseline threshold highlighted in both *Smith* and *Tobias*—that an altercation must only attract the attention of one person to move from the 'individual' to the 'public' realm. And at a minimum, it definitively caught the attention of at least one person—Officer Wasserman himself. He rushed over and intervened to protect his colleague, who told him she feared for her safety.

Plaintiff's conduct was public in nature not simply because he was yelling and cursing at police officers; his actions meet the criteria across all of the factors "considered in the public dimension calculus." *Weaver*, 944 N.E.2d at 636.

This scenario is distinguishable from cases like *Provost v. City of Newburgh*, where the court failed to find that there was probable cause for disorderly conduct even though the plaintiff was shouting and cursing at police officers—inside a police station, no less. 262 F.3d 146 (2d Cir. 2001). In *Provost*, unlike in *Smith*, or *Stern*, or *Tobias*, the court found a potential reason, beyond outrage, for the plaintiff to have yelled as he did. In *Provost*, the plaintiff was stuck behind a bullet-proof glass window and was trying to attract the attention of police officers nearby. A reasonable jury, the *Provost* court posited, might find that the plaintiff was yelling merely to compensate for the significant obstacle in his way. Here, by contrast, Plaintiff certainly

had the police officers' attention.

Officer Wasserman accordingly had probable cause to arrest Plaintiff for disorderly conduct, and the court should grant the motion to dismiss based on qualified immunity.

1.2 The court should grant the motion to dismiss because Officer Wasserman also had arguable probable cause to arrest Plaintiff for disorderly conduct.

Police officers are also entitled to qualified immunity when the law in question was not "clearly established" at the time of the officer's actions (i.e., the officer had arguable probable cause). *Zalaski v. City of Hartford*, 723 F.3d 382. A law is only "clearly established" when, at the time of the alleged misconduct, it is "sufficiently clear that every reasonable official would understand that what [the officer] is doing is unlawful." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). In other words, if reasonable officers can disagree about whether the act in question is lawful (some believing it lawful, others unlawful), the law is not clearly established. In those situations, a police officer is entitled to qualified immunity.

Additionally, for a law to be clearly established, legal precedent must place its constitutionality "beyond debate." *Wesby*, 138 S. Ct. at 589 (quoting *Ashcroft v. al–Kidd*, 563 U.S. at 741). "The rule must be 'settled law,' which means it is dictated by 'controlling authority' or 'a robust consensus of cases of persuasive authority.'" *Id.* at 589-90 (quoting *al–Kidd*, 563 U.S. at 741-42). The Supreme Court calls this a "demanding standard," which, as stated above, "protects all but the plainly incompetent or those who knowingly violate the law." *Id.* at 589 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The Supreme Court and Second Circuit grant great latitude to police officers in determining what is reasonable precisely because they understand that officers' decisions are highly fact- and situation-specific, and that "for the public benefit, public officials [must] be able to perform their duties unflinchingly and without constant dread of retaliation." *Amore v. Novarro*, 624 F.3d 522, 530 (2d Cir. 2010).

Reasonable officers can reasonably disagree about the legality of an arrest in circumstances that merely "sugges[t] criminal activity." *Wesby*, 138 S. Ct. at 589. In *Dist. of Columbia v. Wesby*, for example, when police came upon a debaucherous scene involving "a group of people who claimed to be having a bachelor party with no bachelor" who then "fled at the first

sign of police," 138 S. Ct. at 589, the Supreme Court found that it would not "have been clear to every reasonable officer that, in these circumstances," there was no crime being committed. 138 S. Ct. at 592.

Police officers are also "not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." *Garcia v. Does*, 779 F.3d 84, 96 (2d Cir. 2015). In a case where K-Mart shoppers refused to answer officers' questions and instead began to yell, a New York district court found that the arresting officer was "entitled to qualified immunity because it was objectively reasonable for him to believe that probable cause existed" to effectuate an arrest for disorderly conduct. *Givans v. Jefferson Cnty. Sheriff's Off.*, No. 13-CV-0906, 2015 WL 13540492, at *15 (N.D.N.Y. Aug. 28. 2015). "Because the officers repeatedly told plaintiffs to calm down and plaintiffs did not stop yelling," the court wrote, "[the officer] had at least arguable probable cause to believe that plaintiffs acted 'with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof.'" *Id.*

Even in instances where police officers have arrested plaintiffs based on unconstitutional statutes, courts have found that the officers acted with arguable probable cause and were thus entitled to qualified immunity. In *Amore v. Novarro*, the Second Circuit overturned a lower court decision and granted qualified immunity to a police officer who had arrested Amore for "loitering for the purpose of deviant sexual activity," which was the basis for a statute that had been found to be unconstitutional. 624 F.3d at 526. Even when police officers are "enforcing what they reasonably, but mistakenly, think is the law," the Second Circuit wrote, "we generally extend qualified immunity." *Id.* at 531.

Demonstrating that a rule is "settled law" through "controlling authority" or "a robust consensus of cases of persuasive authority," meanwhile, requires a "high degree of specificity." *Wesby*, 138 S. Ct. at 590. The Supreme Court has repeatedly ruled that plaintiffs cannot clear this lofty 'clearly established' standard without "identify[ing] *a* case" that mirrors so tightly the facts of the case at hand that it puts the defendant-officer "on notice that his *specific* conduct was unlawful." *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (emphasis added). The legal standard at issue in every case must "clearly prohibit the officer's conduct in the particular circumstances before him." *Wesby*, 138 S. Ct. at 590. Indeed, the Supreme Court stressed, "[s]pecificity is especially important in the Fourth Amendment context." *Cortesluna*, 142 S. Ct.

at 8.

In *Wesby*, the Supreme Court chastised lower courts for failing to find arguable probable cause when neither those courts nor the plaintiff-"partygoers have identified a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation 'under similar circumstances.'" *Wesby*, 138 S. Ct. at 591. Lower courts "undermine the values qualified immunity seeks to promote," the Court emphasized in a separate case, when "what is not clearly established is held to be so." *Ashcroft v. al–Kidd*, 563 U.S. at 735.

Here, reasonable officers could very well disagree about whether Officer Wasserman had probable cause to arrest the Plaintiff for disorderly conduct. As discussed above, the public harm factors point to an officer reasonably drawing that conclusion—as Officer Wasserman did himself. So, too, did the unnamed officers who assisted in effectuating the arrest. So, too, did Officer Madison, who told Officer Wasserman that she feared for her safety. The "totality of the circumstances," as in *Wesby*, "gave the officers plenty of reasons" to act on a reasonable belief that the Plaintiff was committing disorderly conduct. 138 S. Ct. at 589.

Moreover, just as the officers in *Garcia v. Does* need not have "explore[d] and eliminate[d] every theoretically plausible claim of innocence before making an arrest," Officer Wasserman did not have to read Plaintiffs' mind to determine that he possessed the requisite mens rea for disorderly conduct. 779 F.3d at 96. As the *Garcia* court wrote, Officer Wasserman need not have "engage[d] in an essentially speculative inquiry." *Id*. And as the *Givans* court found, a plaintiff simply refusing to stop yelling after repeated requests to calm down is in and of itself sufficient to establish arguable probable cause. 2015 WL 13540492.

Finally, it is not "beyond debate" that Officer Wasserman's actions were unconstitutional. Indeed, as set out above, Officer Wasserman has a very strong argument that his actions were wholly constitutional. Regardless, as the Supreme Court continues to make clear, Plaintiff's counsel must find a case that reflects the exact circumstances of this specific situation to demonstrate that the law in question is "clearly established." *Cortesluna*, 142 S. Ct. at 8. No such case exists. In fact, many cases show the opposite, further muddying the waters: Courts have continuously found that police officers acted with arguable probable cause in far more extreme circumstances—even when the statute in question had already been ruled unconstitutional.

New York's disorderly conduct statute is constitutional. But that does not mean it is

"clearly established" for the purposes of determining arguable probable cause. The question is not whether the disorderly conduct statute itself is "settled law," but whether reasonable officers could disagree about Officer Wasserman's actions in enforcing the statute. The Supreme Court is unambiguous: *every* reasonable officer must conclude that the actions at issue were unlawful. And that was not the case here. Officer Wasserman reasonably—and rightly—believed that his actions were lawful, as did at least four other officers.

Should the court find that Officer Wasserman did not have probable cause to arrest the Plaintiff for disorderly conduct, then, it should doubtless find that Officer Wasserman had arguable probable cause.

Conclusion

The City of New York accordingly asks that the court grant the motion to dismiss based on qualified immunity. Officer Wasserman possessed probable cause—or at least arguable probable cause—when he arrested the Plaintiff for disorderly conduct. The public harm factors central to any disorderly conduct arrest all underscore that Officer Wasserman's actions were reasonable given the information he had at the time: Officer Madison's fear for her safety, Plaintiff's "explosion" and refusal to calm down, and the gathering crowd drawn to Plaintiff's outburst all point to public harm. Or, they do so enough that other reasonable officers would find that Officer Wasserman acted lawfully, as at least four such officers did here.

What's more, no precedent places Officer Wasserman's conduct "beyond debate." No other cases are factually similar enough to the case at hand to have put Officer Wasserman "on notice that his *specific* conduct was unlawful." *Cortesluna*, 142 S. Ct. at 8 (emphasis added).

The courts created and continue to uphold qualified immunity to give police officers the discretion they need to protect the public. Lower courts "undermine the values qualified immunity seeks to promote" when "what is not clearly established is held to be so." *Ashcroft v. al–Kidd*, 563 U.S. at 735. We ask that this court follow the Supreme Court and Second Circuit's longstanding precedent upholding those values. We ask that this court grant the motion to dismiss based on qualified immunity.

Applicant Details

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Applicant Education

BA/BS From	**Columbia University**
Date of BA/BS	**May 2013**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 20, 2020**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 8, 2023

The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, Vermont 05401

Dear Judge Robinson,

I write to apply for a clerkship in your chambers for the 2024-2025 term. I am currently clerking for Judge Lorna G. Schofield of the Southern District of New York and will complete my clerkship in August. As requested, enclosed are a resume, law school transcript, undergraduate transcript, and a writing sample. The writing sample is an appellate brief arguing for the application of an exception to foreign sovereign immunity, written for a simulation federal courts course taught by Judge Harry T. Edwards of the D.C. Circuit. I prepared the brief alone, and others have reviewed it only for grammatical and typographic errors.

Also enclosed are recommendation letters from the following:

Dale Ho
Director, ACLU Voting Rights Project
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212-549-2693

Prof. Deborah Malamud
AnBryce Professor of Law
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My experience clerking on the district court has sparked a strong interest in clerking at the appellate level. Over the past nine months, I have been exposed to some of the wide variety of cases that come through the federal system. While the learning curve is steep, the challenge of quickly, accurately, and impartially applying the law is very exciting, and I would love to do it again.

Please let me know if you have any questions or would like additional materials to aid in your decision. Thank you in advance for your time and consideration.

Respectfully,

William Hughes

William Hughes

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Education

New York University School of Law (New York, NY)
J.D., received *magna cum laude*, Order of the Coif, May 2020. GPA: 3.852.
Honors: Arthur Garfield Hays Civil Rights & Civil Liberties Program, Robert Marshall Fellow
Pomeroy Scholar (awarded to ten students with top cumulative grades after first year)
Florence Allen Scholar (awarded to 10% of students with top cumulative grades after second year)
New York University Law Review, Articles Editor
Activities: Racial Justice Clinic (fieldwork with ACLU Voting Rights Project, January – May 2019)
Research Assistant: Prof. Ricky Revesz (June 2018 – May 2020); Prof. Sam Issacharoff (February – November 2019); Prof. Deborah Malamud, Research Assistant (September – November 2018)

Columbia College, Columbia University (New York, NY)
B.A., double major in Mathematics and English Literature, received May 2013.
Honors: Senior Marshall (fifteen chosen for academic and extracurricular achievement)
Activities: Columbia College Student Council, Vice President for Policy
GHAP Archive Project (designed an oral history of AIDS advocacy group, with website and physical archive)

Experience

Hon. Lorna G. Schofield, Southern District of New York (New York, NY) *Judicial Clerk* **September 2022 – August 2023**
- Assist federal judge in all aspects of her caseload, including drafting opinions and orders, proposing and effectuating day-to-day case management decisions, researching novel legal issues, and communicating with court staff and parties.

Knight First Amendment Institute (New York, NY) *Legal Fellow* **September 2021 – August 2022**
- Legal fellowship with impact litigation organization focusing on application of the First Amendment to the digital age.
- Drafted portions of petition for certiorari in constitutional challenge to intelligence agencies' system of prepublication review.
- Coordinated six sets of FOIA requests to nineteen federal agencies relating to prepublication review, acting as the point person on narrowing the scope of requests, negotiating production timelines, and identifying withholdings to challenge in litigation.

American Civil Liberties Union, Voting Rights Project (New York, NY) *Legal Fellow* **October 2020 – September 2021**
- Assisted with lawsuits relating to 2020 Elections by drafting motions, recruiting clients, and performing legal research.
- Acted as VRP lead on federal legislation, authoring ACLU report on the Voting Rights Advancement Act for congressional record, reviewing bills for policy and constitutionality, and drafting and editing statutory language in model legislation.
- Developed and drafted constitutional challenge to state ban on "line-warming," providing voters in line with food and water.
- Developed and drafted portions of state apex court brief seeking to overturn a felony conviction for fraudulent voting.

New Economy Project (New York, NY) *Legal Intern* **September – December 2019**
- Placement with consumer rights and economic justice organization, providing direct legal services to indigent clients.
- Researched federal and state preemption issues on New York City's ability to end business with certain banks.

Altshuler Berzon LLP (San Francisco, CA) *Summer Associate* **May – August 2019**
- Aided public-interest firm with its docket focused on labor and employment, environmental, and constitutional litigation.
- Drafted U.S. Supreme Court amicus brief regarding scope of Title VII's protections for LGBTQ+ people.

New York City Office of Management and Budget (New York, NY) *Analyst* **November 2015 – May 2017**
- Modeled trands and reviewed budget requests for nine New York City agencies, comprising $1.9 billion in annual budget.
- Coordinated annual reconciliation of municipal water bills with Department of Environmental Protection expenses.

Additional Information

Volunteer Experience: Ali Forney Center (homeless shelter for LGBTQ+ youth) – Mentor; SAGE (Advocacy & Services for LGTBQ+ Elders) – Volunteer.
Interests: Cooking, gardening, architecture, urbanism and transit, travel, weight-lifting.

Name: **William M Hughes**
Print Date: **05/29/2020**
Student ID: **N17912765**
Institution ID: **002785**
Page: **1 of 2**

New York University
Beginning of School of Law Record

Fall 2017

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Melina A Healey			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Kim A Taylor-Thompson			
Procedure	LAW-LW 11650	5.0	A
Instructor: Burt Neuborne			
Contracts	LAW-LW 11672	4.0	A
Instructor: Barry E Adler			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Discovering New York City			
Instructor: Clayton P Gillette			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2018

School of Law
Juris Doctor
Major: Law

Property	LAW-LW 10427	4.0	B
Instructor: Katrina M Wyman			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Melina A Healey			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A
Instructor: Deborah C Malamud			
Torts	LAW-LW 11275	4.0	A
Instructor: Mark A Geistfeld			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Discovering New York City			
Instructor: Clayton P Gillette			

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Pomeroy Scholar-Top Ten Students in the first year class

Fall 2018

School of Law
Juris Doctor
Major: Law

Class and Inequality Seminar	LAW-LW 10226	2.0	A
Instructor: Deborah C Malamud			
Environmental Law	LAW-LW 11149	4.0	A
Instructor: Richard L Revesz			
Constitutional Law	LAW-LW 11702	4.0	A-
Instructor: Melissa E Murray			
Labor Law	LAW-LW 11933	3.0	A-
Instructor: Samuel Estreicher			
Wilma Beth Liebman			
Marshall Bruce Babson			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Richard L Revesz			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2019

School of Law
Juris Doctor
Major: Law

Racial Justice Clinic	LAW-LW 10012	2.0	A
Instructor: Claudia Angelos			
Jason D Williamson			
Dale E Ho			
Complex Litigation	LAW-LW 10058	4.0	A-
Instructor: Troy A McKenzie			
The Law of Democracy	LAW-LW 10170	4.0	A
Instructor: Samuel Issacharoff			
Racial Justice Clinic Seminar	LAW-LW 11764	3.0	A
Instructor: Claudia Angelos			
Jason D Williamson			
Dale E Ho			
Modern Crosscurrents in Energy and Environmental Law	LAW-LW 12639	2.0	A
Instructor: David Hayes			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	59.0	59.0

Allen Scholar-top 10% of students in the class after four semesters

Fall 2019

School of Law
Juris Doctor
Major: Law

Hays Program Seminar	LAW-LW 10004	1.0	CR
Instructor: Martin Guggenheim			
Sylvia Law			
Federal Courts and The Appellate Process	LAW-LW 10917	4.0	A
Instructor: Harry T Edwards			
Law Review	LAW-LW 11187	1.0	CR
Immigration Law & Rights of Non Citizens	LAW-LW 11610	4.0	A-
Instructor: Adam B Cox			
Professional Responsibility and the Law	LAW-LW 12525	2.0	A
Governing Lawyers: A Public Interest Perspective Seminar			
Instructor: Barbara Gillers			
Class Actions Seminar	LAW-LW 12721	2.0	A-
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	73.0	73.0

Spring 2020

School of Law
Juris Doctor
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
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Hays Program Seminar	LAW-LW 10004	1.0	CR
Instructor: Helen Hershkoff			
Martin Guggenheim			
Criminal Procedure Survey	LAW-LW 10436	4.0	CR
Instructor: Andrew Weissmann			
Law Review	LAW-LW 11187	1.0	CR
Evidence	LAW-LW 11607	4.0	CR
Instructor: Daniel J Capra			
Federal Courts and the Federal System	LAW-LW 11722	4.0	CR
Instructor: Helen Hershkoff			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	87.0	87.0

Name:	**William M Hughes**
Print Date:	**05/29/2020**
Student ID:	**N17912765**
Institution ID:	**002785**
Page:	**2 of 2**

Staff Editor - Law Review 2018-2019
Articles Editor - Law Review 2019-2020

End of School of Law Record

New York University
A private university in the public service

School of Law

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Richard L. Revesz
AnBryce Professor of Law and Dean Emeritus (on leave)

March 27, 2023

RE: William Hughes, NYU Law '20

Your Honor:

With enormous enthusiasm, I recommend Will Hughes, a spectacularly talented 2020 graduate of New York University School of Law, for a clerkship in your chambers. Will was one of the very strongest students in his class, ranking in the top 3 or 4%. At graduation, he was awarded his degree *magna cum* laude and elected to the Order of the Coif. Also, he is one of the most public interest oriented students I have taught in years. After graduation, Will served as a fellow at the American Civil Liberties Union's Voting Rights Project during 2020-21. He is currently a fellow at the Knight First Amendment Institute (2021-22) and will then be a law clerk to the Honorable Lorna G. Schofield, of the United States District Court for the Southern District of New York (2022-23).

Will was a star in my Environmental Law class in Fall 2018, where he excelled across the board. In class, Will demonstrated a sharp grasp of the complex regulatory framework shaping environmental law. He was a wonderful participant in the discussions, and his contributions invariably raised the level of the conversation. His final examination was really terrific. He excelled in traditional issue spotting questions, displaying incisive analytical skills and a profound command of the materials. He also provided creative and well- formulated answers to more open-ended questions about how future environmental regulation should be structured. Will organized his arguments succinctly and powerfully, and his answers revealed extraordinary critical skills. He has an admirable ability to see the nuances in complicated legal arguments and he marshals doctrine and policy arguments with great perceptiveness. He received one of the few As in the class and it was very well earned.

I am enormously fortunate that Will worked with me as a research assistant in three extremely challenging projects. His work on each was truly exceptional and was definitely the work of a professional colleague, which is an extremely unusual feat even for a very talented student research assistant.

Over the holiday break in 2019, I asked Will to work on a section of a Supreme Court brief I authored in *Seila Law v. CFPB*. Will did excellent research under enormously tight timing constraints. He was able to delve into the interstices of the administrative state with great skill,

developing arguments that had previously been part of the legal discussion concerning the separation of powers issues in this case.

On my co-authored book with Michael Livermore, *Retaking Rationality* (Oxford University Press, 2020), Will worked on a section dealing with the misuse of cost-benefit analysis in justifying deregulation. The task was a very difficult one because I asked Will to read and absorb a half dozen or so complex final rules and to look for inconsistencies in the use of economic justifications. These were not topics he was familiar with when he began working on the project, but he developed an astonishingly quick mastery and crafted an extraordinarily impressive analysis. The quality of his writing was also terrific. As a result, the section that he drafted will make it into my book with relatively little editing.

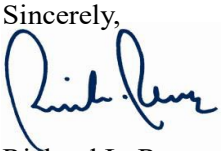
Will also did terrific work on an important section of an article I co-authored with Bethany Davis Noll, "Regulation in Transition," 104 *Minnesota Law Review* 1 (2019). For this project, I asked Will to draft a section on political systems in which a provision must receive support through multiple votes across time before becoming effective. Such schemes are relatively common for constitutional amendments in some states and foreign jurisdictions. Again, Will's ability to efficiently analyze fairly obscure sources was really impressive. And, as in the case of the book manuscript, Will's draft made it into the final version with relatively little editing.

I still cannot quite figure out how Will accomplishes all that he does. In addition to the enormous amount of work he did for me, Will was also a research assistant to Professors Rachel Barkow, Deborah Malamud, and Samuel Issacharoff. I know that these colleagues, who routinely get terrific research assistants, also place Will right at the top of the Law School's talent pool. And, Will served as an Articles Editor on the NYU Law Review, and as a fellow in the Arthur Garfield Hays Civil Rights and Civil Liberties Program. It is hard to imagine that there is any student who has taken better advantage than Will of the Law School's intellectual resources!

Will was also very focused on his citizenship at the law school. He was a mentor to first-year students in OUTLaw and had a leadership role in the Rose Sheinberg Committee, which arranges an annual lecture on issues of gender, race, and class.

In addition to his outsize talent, Will is remarkably mature, hardworking, responsible, and collegial. He would be an absolute pleasure to work with. In sum, I have no doubt that he will be an off-the-charts law clerk. I have gotten to know his work unusually well and I would hire him in a minute! If you have any questions about Will, or if you need additional information, please do not hesitate to reach out to me.

Sincerely,



Richard L. Revesz

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Deborah C. Malamud
AnBryce Professor of Law Emerita

May 30, 2023

RE: William Hughes

Dear Judge:

It is my honor to recommend William (Will) Hughes for a clerkship in your chambers. Will, who graduated from New York University School of Law *magna cum laude* and in the top ten percent of his class, is one of the most extraordinary students I have ever taught.

I taught Will in two very different settings. Will was the star student in both my first-year course in Legislation and the Regulatory State ("LRS") and in my seminar on Class and Inequality. In these settings, I was able to see the diversity of his strengths.

In LRS, he brought a depth of understanding and a level of creativity to class discussions that I found breathtaking. He was unavailable to serve as a teaching assistant for me the following year, so instead I asked him to be a research assistant to help me update and rethink my views on several core topics in the course. He wrote me a series of fabulous memos, ranging from technical issues in notice and comment rulemaking to the ongoing debates on the relationship between "Chevron" and arbitrary-and-capricious review, which I drew on heavily and to good effect in my teaching this year. His research, analysis, and writing were all superb.

Will was also, hands down, the star of my seminar on Class and Inequality. The seminar calls for an extraordinary high level of student participation. Students write reaction papers every week, and, except for the first five classes, students (working in small groups) choose topics for the remaining classes, with each group selecting readings and leading the class discussion. Throughout the semester, Will managed a quite extraordinary feat – one that I often fail at myself in this setting. While being respectful of the voices of all students, who were often dealing with subject matters with great resonance in their personal lives, Will was the student who, by his example, insisted on maintaining a high level of analytical rigor and clarity in class discussions. He tried hard not to speak too much or too soon, but once discussions were underway and beginning to drift, Will would make a comment that tied it all together, or that redirected a discussion after a wrong or fruitless turn threatened to take hold. His own weekly papers were strong, clear, theoretically challenging and always worth savoring; his readings on climate change were well-chosen and well-presented; and his final

paper (comparing competing narratives of the socio-economic dimensions of climate change) was fascinating, well-written, and captured the aspirations of the seminar. (All of his writing was on deadline, and all of it was well-crafted – even his weekly ungraded reaction papers. Will's writing is never casual, and it is never late.)

It should come as no surprise that Will combines so many strengths. Many of those strengths were already in place before he came to law school. Will double-majored in Mathematics and English, had four years of work experience before law school as a paralegal in complex litigation and as a budget analyst in New York City's Office of Management and Budget, and was a committed environmentalist with a global perspective and a strong background in left political theory. He continued to grow in law school. He broadened his range of experiences and interests to new dimensions of public interest work (voting rights, labor law, and criminal law among them), both through his course work and as a Hays Civil Rights Fellow during his third year. His experience as a legal fellow at the ACLU's Voting Rights Project during a presidential election year has focused his interest in that field, which is the perfect place for someone with Will's legal and analytical rigor. And his current work at the Knight Foundation anchors his expertise in the First Amendment.

But none of what I have written really captures what is most unique about Will. Will came to New York from rural Northern California. He was not oriented towards the world of law – or the world of elite professional life -- through family background or experiences. He came to law school to get the training he needed to become an environmental lawyer. When he got here, when professors started to notice him and his superb grades first appeared and then kept coming, he was invited to chase after gold rings on the merry-go-round of career status and prestige. I remember going through that myself when I was in law school. All of a sudden, faculty members start whispering in your ear about all the things you "could be" that you never dreamed of, and then – if, like Will, you are a genuine adult about such things – you have to figure out how to grow with integrity. He has decided, for now, not to organize his life around becoming a law professor (which he still might decide to do someday). Instead, he is focusing on developing his skills as a litigator and activist. If Will does become an academic someday (and I do hope that he will, for the academy's sake), he will be an unconventional one. He will bridge political theory, advocacy skill, and doctrinal rigor in a manner that is uniquely his own. His career will not – in this, or in any other, way -- be the product of any bureaucratic process that purports to know the "right" path. He will transcend the boundaries of the conventional.

Will is gifted, serious, and destined for great things. I hope you will take the opportunity to meet him. I would be delighted to speak with you about him. Please feel free to contact me by cellphone (917-414-7471) or email (deborah.malamud@nyu.edu).

Sincerely,

Deborah C. Malamud
AnBryce Professor of Law Emerita

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Samuel Issacharoff
Reiss Professor of Constitutional Law

Dear Judge:

Will Hughes is a person of many interests and many dimensions. The easiest part is to say that he is a stellar student, among the dozen or so highest GPAs in the school. That follows a standout undergraduate career at Columbia, with majors in mathematics and English literature. The range of interests, the intellectual curiosity, and the smarts – they are all on constant display in the academic setting. Will has been a magnet for professors seeking high quality research assistance. Her performs wonderfully and will be a wonderful law clerk.

I did not have Will as a student until this past semester in an upper-level constitutional law course on the Law of Democracy. He of course got an A from me, as he has in all but one course in law school. He is a whiz as a law student. But the impression he makes as a law student is not simply a matter of grades. In every interaction, in class and outside, Will shows a deep and passionate engagement with the law itself, from doctrine to policy. He is a real thinker and brings the penetrating intelligence to issues of both practical application and broad theoretical implication. A delight as a student.

Will was not my student when I hired him as a research assistant. This is unusual because I usually fill my roster of RAs from the ranks of my top students. Will first approached me last year saying that even though he had not yet taken a course with me, he was interested in working as a research assistant in the public law areas that I cover. I was pretty full up but was nonetheless intrigued because of how impressive he was in an interview setting. I reached out to Will in January when a new project revealed itself to have a much tighter time frame than I had imagined.

The assignment I gave Will was the sort that I usually give a student only after he or she has shown how they work on other, smaller projects. But I was under time pressure and decided that I thought Will could handle it. The undertaking was to transform a lecture I had given in Spanish to the Constitutional Court of Colombia and work it up into a book chapter for an Oxford University publication on comparative constitutional law that the Chief Justice was organizing. I had a series of lecture notes, half in English, half in Spanish, and some materials that I had relied upon in putting together the talk. Turning it into a full book chapter required research, recrafting the presentation, harnessing the argument, and creativity. I proceeded to meet several times with Will and then to trust him to deliver a manuscript that I could finalize for the Court. In many ways, this is much like the work a law clerk does for a judge in working through the ideas and then creating a draft manuscript that can be finalized into an opinion.

Will did a great job, effectively saving my ability to get the project done in time. He not only worked with the materials I gave him, he used other resources in an imaginative way that created a really fine manuscript. Most impressively, he read my prior writings in the area (as would a judicial clerk with a judge's

prior opinions) and drew beautifully from a rather abundant set of sources in putting this together. I could not have asked for better and I could not have been more pleased.

This summer, Will is working at Altshuler Berzon in San Francisco. Although this is a fulltime job (and probably more), Will asked to continue working on research that does not have a tight deadline, so as to accommodate the needs of litigation. I have asked him to research and chronicle the various arguments made on the rise of populism, a topic of a new book project for me. When I met with Will to discuss the research agenda, I was amazed at how engaged he was in the topic already and his command of resources that I had not yet engaged. Even that initial meeting was simply fun.

I am confident that he will be a first-rate law clerk. He is a thinking person who works diligently at the level of the particular and the general. He is an easy-going person with a ready sense of humor. I have enjoyed having him as a student and working with him on various research projects. I think all his qualities will translate seamlessly into great success as a law clerk.

Please feel free to call if there is any further information I can provide.

Sincerely,

Samuel Issacharoff

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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Voting Rights Project
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125 Broad Street, 18th Floor
New York, NY 10004-2400
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May 30, 2023

Re: Letter of Recommendation for Will Hughes

Your Honor,

I write in unequivocal support of Will Hughes's application for a judicial clerkship in your chambers. During my years of practice—first as a judicial law clerk, then at the NAACP Legal Defense Fund, and now at the ACLU and as a clinical professor at NYU—I have worked with dozens of young lawyers from around the country. Will is easily one of the most talented young lawyers with whom I have had the good fortune to work. He has one of the keenest minds that I've encountered and would make an outstanding law clerk. I offer my highest possible recommendation for him.

As an initial matter, Will's work product is uniformly excellent. During the semester that Will was my clinic student at NYU, he also worked with me as an intern at the ACLU Voting Rights Project. In just one semester, Will produced more top-notch, high-quality work than any semester-long intern we have ever had, and we relied on him regularly in some of our most high-profile cases. To take just one example, as I was drafting our Supreme Court merits brief in a case concerning the previous Administration's attempt to place a citizenship question on the 2020 census questionnaire, Will drafted a series of extremely helpful memoranda, surveying dozens of complex APA decisions. Will's work went directly into our merits brief, and I relied heavily on his research as I was preparing for oral argument. We ultimately won the case before the Supreme Court, and Will's work was invaluable along the way.

Will's overall body of work during the semester was truly impressive. To take another example, Will compiled the facts, researched possible claims, and drafted sections of a complaint challenging a Florida law requiring that former felony offenders repay legal financial obligations associated with their convictions before regaining the right to vote. When we eventually filed the complaint, it featured two claims that Will had researched and drafted, and we later relied heavily on his work in moving for a preliminary injunction, which we successfully obtained in a decision that was subsequently affirmed by the Eleventh Circuit. During the same semester, Will also researched federal legal claims to challenge a New Hampshire law that requires college students from out-of-state to obtain New Hampshire driver's licenses and, if they owned a car, to obtain

New Hampshire plates—both at considerable cost, in the hundreds of dollars. We once again relied heavily on Will's legal research in successfully opposing the motion to dismiss.

Will did all of this work (and more) in a single semester as a part-time intern. It's no exaggeration to say that we have never had such a prolific intern, let alone one who produced so much high-quality work. He's extremely hard-working and absolutely brilliant. Because of this, we were thrilled to welcome him back to our team for a one-year fellowship after he graduated. During his time with us, he participated in our rapid response leading up to the 2020 elections and other ongoing litigation, and became an integral member of our team.

What most sets Will apart from his peers is that he is the strongest writer of any law student with whom I have ever worked. In my clinic at NYU, we ask students to write weekly response papers, mainly to give us a sense for what resonates with them and what questions they have, in order to guide classroom discussions. Will elevated this somewhat mundane task to an art form. Every week, his papers were crisp, insightful, and witty—and often led me to think about the readings in new and different ways that I hadn't previously considered.

In sum, Will has all of the qualities that I imagine you would be looking for in a law clerk. He is one of the smartest people I have ever met; he is extremely hard-working and takes initiative, often producing work that goes far beyond the tasks requested; and he is a joy to have around as a colleague. If you have any questions about Will that I might be able to answer, please do not hesitate to contact me.

Sincerely,

Dale Ho
Director, ACLU Voting Rights Project
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New York, NY 10004
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dale.ho@aclu.org

William Hughes

Writing Sample – *Azima v. RAK Investment Authority* Brief

The following writing sample is a portion of a brief for a simulation course in appellate advocacy, Federal Courts and the Appellate Process, taught by Judge Harry Edwards of the D.C. Circuit. For our final project, we wrote briefs arguing a recent case in which Judge Edwards served on the panel, based on the actual records below and the District Court order under appeal. My case was *Azima v. RAK Investment Authority*, 926 F.3d 870 (D.C. Cir. 2019), concerning the application of the commercial activities exception under the Foreign Sovereign Immunities Act to an alleged computer hack.

While the brief was prepared with a partner, who handled a separate legal issue (whether *forum non conveniens* applies), the attached portions were written entirely by me, and reviewed by my partner for typographical and grammatical errors. I also complied with Judge Edwards' strict rule forbidding us from reading the actual briefs or opinion from the case.

I received an A in the course, and Judge Edwards has granted permission to use this brief as a writing sample.

ISSUES PRESENTED FOR REVIEW

1. Under the Foreign Sovereign Immunities Act, sovereign immunity does not apply to claims based on acts taken in connection with commercial activity that cause a direct effect in the United States. RAKIA, the investment arm of a foreign sovereign, hacked into Farhad Azima's computers in the United States to gain advantage in a commercial dispute which Azima was mediating, thereby causing damage to the computers. Is RAKIA subject to jurisdiction under this exception?

[…]

STATEMENT OF THE CASE

Factual Background

Plaintiff-appellee Farhad Azima is a successful American businessman who resides in Kansas City, Missouri, and conducts business worldwide. Am. Compl. ¶ 7, Joint Appendix ["J.A."] 413. Defendant-appellant Ras Al Khaimah Investment Authority ("RAKIA") is the investment arm of Ras Al Khaimah ("RAK"), one of seven emirates comprising the United Arab Emirates ("UAE"). Id. ¶¶ 9, 12, J.A. 414. From its UAE headquarters, RAKIA manages international commercial ventures and does not engage in any non-commercial activity. Id.

RAKIA and Azima have a long-standing commercial relationship. […] Therefore, it is unsurprising that RAKIA turned to Azima to mediate a dispute between RAKIA and its former CEO, Dr. Khater Massaad. Id. ¶ 23, J.A. 418–19. RAKIA accuses Massaad of embezzling funds while CEO; in addition to attempting to negotiate with Massaad, RAKIA has also initiated criminal proceedings against him. Buchanan Decl. ¶ 3, J.A. 905. Due to their extensive commercial history and Azima's connections with both Massaad and RAK, RAKIA approached Azima for his assistance in mediating the dispute in the fall of 2015. Am. Compl. ¶¶ 23–24, J.A. 418–19. Azima

coordinated meetings between Massaad and RAKIA's representative Jamie Buchanan, as well as between Massaad and RAKIA's counsel Neil Gerrard, and frequently checked in with the parties. Id. Azima incurred significant expenses in his mediation efforts, fully expecting that he would be reimbursed, though RAKIA has not yet compensated him. Am. Compl. ¶ 23, J.A. 418–19.

Instead, RAKIA hacked into Azima's computers. In October 2015, two U.S.-based IP addresses accessed Azima's personal and business computers without his knowledge or permission. Id. ¶ 26, J.A. 419. These addresses sent spear-phishing emails, which contain malicious software and are designed to look like standard emails the recipient would normally receive. Id. ¶ 27, J.A. 419–20. Malware contained in these emails gave hackers access to Azima's computers, including his email and other confidential information, for almost a year. Id.

By July 2016, the mediation between RAKIA and Massaad had not resulted in an agreement, and Gerrard threatened Azima, promising to make him "collateral damage" in RAKIA's war against Massaad. Id. ¶ 35, J.A. 421–22. Within a week, a website appeared repeating RAKIA's claims about Massaad. Id. ¶ 37, J.A. 422. Two more websites appeared shortly thereafter, disparaging Azima in terms similar to previous claims made by RAKIA about Azima. Id. ¶ 38. The first post on one of these websites was traced to the UAE. Id. The websites linked to BitTorrent sites hosting Azima's stolen information, including his messages, calendar, and photos, as well as privileged and confidential materials. Id. ¶ 39, J.A. 422–23. Major search engines do not index—and rather, they proactively block—BitTorrent sites, and most security software similarly blocks users from accessing BitTorrent sites, meaning these sites would functionally not be accessible unless one had a link to them. See Decl. of Thomas J. Kiernan, ¶ 6, J.A. 1012; Am. Compl. ¶ 48, J.A. 425.